OCCUPATIONAL HEALTH AND SAFETY INTERPRETATION OPINIONS

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OCCUPATIONAL HEALTH AND SAFETY ACT

INTERPRETATION OPINIONS

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This is a compilation of edited opinions which have been given from time to time by the Legal Branch of the Ministry of Labour in response to questions put by workers, trade unions, employers, the inspectorate and senior staff of the Ministry. The opinions are the interpretation by a member of the Legal Branch of language and provisions in the Occupational Health and Safety Act and regulations in relation to specific fact situations.

These summaries do not have binding effect but are intended to provide general answers to questions asked in the context of a specific fact situation. They are used by staff of the Ministry to assist in the administration of the Act, and may not be applicable where the facts are dissimilar.

It is unnecessary to point out that questions of construction and application are ultimately to be resolved by the courts.

These opinions do not necessarily reflect the policy of the Government of Ontario, the Ministry of Labour or the Ministry of the Attorney-General.

OCCUPATIONAL HEALTH AND SAFETY ACT

Interpretation Opinions

of

Legal Branch, Ontario Ministry of Labour

April, 1982

FOREWORD

This is a compilation of edited legal opinions which have been given from time to time by the Legal Branch of the Ministry of Labour in response to questions put by employers, workers, trade unions and the inspectorate of the Ministry. The opinions are the interpretation by a member of the Legal Branch of language and provisions in the Act.

The edited opinions do not have binding effect but are intended to provide answers to specific questions asked. They are being used by staff of the Ministry to assist in the administration of the Act.

It is unnecessary to point out that questions of construction and application will find their ultimate answer given by the courts where a contest ensues as to construction or application of a provision in the Act.

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SECTION 1

of the Occupational Health and Safety Act

Section 1(25) - Definition of a Work place

1. **Does or could the term work place define a location within a building, an entire building and grounds, a group of adjacent buildings, buildings within several blocks of one another, facilities within a geographical area, etc.?**

The answer can only be a general one and the meaning of workplace will vary in the particular context in which the term is used. The term includes premises in which work is performed, such as a plant or factory; a location comprising several buildings, a particular work area, or a thing in or on which a worker works, such as a truck, tractor, etc. In the context of section 8, it is my view that the term refers to the workplace in a general sense, and not a particular location or thing.

Section 1(26) - Definition of Supervisor

1. **Who is a supervisor?**

The proper interpretation is of considerable significance because of the duty imposed by section 14(2)(b) upon the employer to appoint competent persons as supervisors. A competent person is defined by section 1(2) to mean a person who is qualified by knowledge, training and experience to organize the work and its performance, is familiar with those provisions of the Act and the regulations that apply to the work and knows of potential or actual dangers in the work place.

The term "supervisor" is defined as a person in charge of a work place or with authority over a worker by section 1(26).

There is one important matter to be constantly borne in mind in dealing with the issue raised and that is the conflict of interest which may arise between the supervisor and the worker under sections 16 and 23.

Under section 16 a supervisor is under a strict liability to ensure that a worker works in the manner and with the protective devices, measures and procedures required by the Act and the regulations and uses and wears the equipment, protective devices or clothing the employer requires to be used or worn. In addition a supervisor must advise a worker of dangers of which he knows, provide written instructions, and take every reasonable precaution for the protection of a worker. Failure on the part of a supervisor to do any of these things is an offence. It will be seen that as a supervisor, the person may be put in the position of issuing orders and if not obeyed taking the necessary steps to ensure his orders are complied with.

Under section 23(4), where a right of refusal of unsafe work is exercised by a worker, the employer or supervisor is to be notified and investigate and make a decision thereon by rectifying the matter causing the refusal or ruling that the refusal to work is proper or improper.

There are the possibilities of many occasions in which the worker and the supervisor may be in conflict, and in which the supervisor may have to exercise such functions as decisions upon discipline; taking remedial action to correct the work procedures; allowing work to be suspended pending corrective action; re-scheduling the work; ordering equipment out of service and repairs thereto; etc. All these matters can be termed generally as decision-making powers that can affect the terms of employment, the employment relationship and the policies of the employer. If the person were a supervisor with such powers and at the same time within the worker ranks, he would be under severe stress in conflict situations that would occur.

2. **The Education Act prescribes that the principal is in charge of and responsible for the school, and its staff. Is a principal a supervisor under the Occupational Health and Safety Act?**

According to the duties and responsibilities placed upon a principal by the Education Act, the principal is supervisor.

Section 1(29) - Who is a worker?

1. **Are faculty members of a community college excluded from the Act under section 3(3)?**

Section 3(3) states that the Act does not apply to teachers or university (or related institutions) teaching staff. The words "related institution" are considered not to apply to community colleges. Thus, the faculty members of community colleges are subject to the Act.

2. **If faculty members are not excluded from the Act, are all such members supervisors?**

The Act's provisions are not governed or affected by private arrangements or agreements made between parties. You ask if faculty members are to be classified as supervisors because they have charge of an industrial shop. They are in charge, but the question to be answered is whether an industrial shop in an institution of learning is a work place in which workers work. It seems to us the industrial shop is a class room and that the pupils or students are not workers. Accordingly the faculty members are workers in the industrial shop but are not supervisors in relation to the students or pupils because the latter are not workers.

3. **Are students in a career training program who receive compensation, workers while attending classes in a college?**

While the students described receive some monetary compensation, their primary role at the college is to take part in an educational program. It is clear that they are not employees of the community college. Thus, students in Manpower training courses at community colleges are not workers for the purposes of the Act and are not covered by its provisions. It is worth noting that to the extent that work conditions and arrangements must meet the requirements of the Act as they apply to faculty members and other staff of the community college, it is probable that students will also benefit since they share facilities, equipment, etc. with the faculty and staff.

4. **Are students in a career training program workers while being trained in the premises of a participating employer?**

The participating employer provides the locale or work place, tools, etc., gives training and instruction, and grades the level of work performance.

The primary purpose of the program is to teach and train the student so that he or she will be in a position to obtain gainful employment. One may assume that in the course of the instruction, some assistance or work of perhaps minor benefit to the trainer may occur but certainy the student is not working so as to be under a contract of service with the trainer, nor can the student be said to be working so as to be under a contract of service with the community college.

The conclusion is that a student-trainee is not a worker as is contemplated by the Act. Having reached this opinion it follows that the duties and responsibilities as well as the rights imposed and conferred upon employers and workers by the Act do not apply to the trainer or to the community college as notional employers or to the trainee. At the same time, it is pointed out that under the general rules of the common law, duties are imposed upon persons to take reasonable care for the safety and well-being of persons who might be affected by any act or omission. It is in this area of law that duties, responsibilities and rights with respect to a trainee is to be found.

5. **Are inmates of a correctional institution who perform work outside the institution excluded under clause(i)?**

The intent of section 1 paragraph 29 in defining worker was to exclude from the definition of worker only those inmates who work inside the institution or facility.

Accordingly, work performed outside the institution by inmates who are engaged in projects come within the protection of the Occupational Health and Safety Act.

SECTIONS 2 & 3

of the Occupational Health & Safety Act

Application of the Act

1. **Does the Act apply to all trucking operations?**

The Province and the Federal Government do not have arrangements for enforcing each other's legislation as it applies to the trucking industry, and I know of no plans for Ontario's legislation to apply instead of the federal legislation or for Ontario to administer the federal legislation, except for regulations respecting the transport of dangerous goods in the interests of public safety.

The fact that certain parts of the undertaking of a company under federal jurisdiction are carried out in Ontario does not mean that it comes under the Ontario legislation. The basic rule of thumb is that the Federal Government has jurisdiction over those trucking operations which are inter-provincial in nature and the Province has jurisdiction over those trucking operations which are intra-provincial in nature.

The status of the cab of a truck under the Ontario Act as a work place is answered in the affirmative. As for the status of the cab under federal legislation, this is a matter of interpretation of that legislation, and we defer to the federal authorities on this.

2. **Are workers who use radioactive or nuclear materials protected under the Act?**

These workers are within the Occupational Health and Safety Act in so far as their work place is concerned and in relation to their rights and duties respecting conventional occupational health and occupational safety as opposed to radiation safety.

The fact that they use in their work substances that are regulated or licenced by the Atomic Energy Control Board does not alter their status as employees. For some aspects of their work they are subject to the Board's regulations but as to matters other than that of radiation they are within the Act.

3. **Is a federal employee who carries out his duties in a work place to which the Ontario Act applies a worker to whom the Act applies?**

As an employee of a federal department, the inspector is subject to federal laws and regulations in relation to such matters as his working conditions, his right to have representation on a health and safety committee and his right to refuse work in hazardous situations of imminent danger.

At the same time, where a federal employee performs his duties in a work place to which The Occupational Health and Safety Act (Ontario) applies, the federal employee, being a worker, is entitled to have the work place comply with that Act and the regulations, and he, the federal employee, is also subject to the duties imposed upon a worker by that Act and its regulations, e.g., the wearing of protective equipment, etc.

4. **Is a receptionist who is in the nuclear medicine department of a hospital a worker to whom the Act applies?**

Since radioisotopes are under the jurisdiction of the Atomic Energy Control Board, one must examine the regulations made under the Atomic Energy Control Act. An atomic radiation worker is defined as any person who in the course of his work, business or occupation is likely to receive a dose of ionizing radiation in excess of any dose specified in Column IV of Schedule II or any person specified as an atomic radiation worker under section 17(4).

The legislative field having been occupied by the federal legislation, it is my opinion that she should direct her concerns to the A.E.C.B., provided that these involve matters of radiation safety, and not matters of conventional safety.

5. **Does the Act apply to schools?**

The Occupational Health and Safety Act applies to schools, because they are work places for non-teaching staff. This being so sections 28 and 29 of the Act which give inspectors power to inspect and issue orders are applicable to schools. Similarly, the duties imposed upon employers, the Boards of Education, by section 14 and 15 of the Act apply to schools.

Section 14(2)(g) of the Act provides that an employer take every precaution reasonable in the circumstances for the protection of a worker.

O.R. 658/79 for Industrial Establishments does not apply to schools since they are not within the definition of industrial establishment.

In the past, inspectors have referred school boards to the sections in the Industrial Establishments Regulations as guidelines which are appropriate to be followed by the boards to meet the requirements of section 14(2)(g). This approach has been explained by the inspectors to the representatives of the boards during the inspectors' visits. Most school boards have accepted this approach and have taken the necessary steps using the Industrial Establishment Regulations as guidelines.

The Ministry is contemplating a regulation for school premises by which relevant sections of the Industrial Establishments Regulation would be incorporated.

6. **Does the Act bind the Crown?**

The Occupational Health and Safety Act by section 2(1) binds the Crown in right of Ontario and applies to an employee in the service of the Crown.

If a Ministry undertakes renovations either by its own employees or through contractors, the Act applies to it as an owner, constructor or employer as the case may be.

While it is correct to say we cannot prosecute the Crown for breaches of the Act, we certainly can prosecute the Crown's employees for their breaches of the Act, as supervisors or as workers.

SECTION 8

of the Occupational Health & Safety Act

Section 8 - Joint Health & Safety Committees

1. **Can a worker out on strike attend meetings of a joint health and safety committee where the employer continues operations during the strike?**

   By section 1(27) of the Act, "trade union" is one as defined in The Labour Relations Act that has the status of exclusive bargaining agent under the Act in respect of any bargaining unit or units in a work place. The union, being certified by the Ontario Labour Relations Board, is a trade union mentioned in section 8(5) of the Act and is entitled to select the workers on the joint health and safety committee to be established. However, "worker" is defined in section 1(29) as a person who performs work or supplies services for monetary compensation. A worker on strike does not come within the meaning of this definition; furthermore, in view of the important role of the joint health and safety committee in overseeing work place conditions and hazards, it would seem essential that the members of the committee selected by the trade union must have present ability to qualify as "workers" in the meaning of the Act, and thus be present in the work place. Otherwise, it is impossible to see how the committee can be said to be able to function as the Act expects it to, as set out in section 8(6).

Queries concerning application in certain instances

1. **Does Section 8 apply to field staff?**

   There are many industries, particularly service industries or service branches of industry where the service men perform their duties in individual households, or other places. The very nature of the industry requires this. These employees are directed and controlled as to their duties and their performance from the service office. With respect to such employees, it seems to me that their workplace is that from which they are directed and controlled; although their actual work is in the field.

   Section 8 is applicable in respect of field staff, and the approach that section 8 has no application unless twenty or more field staff happen to be assigned to one particular place at any one time is rejected.

2. **Considering that the Act exempts "...workers who work in that part or those parts of a building used for office purposes" from the requirement for joint health and safety committees, are the office cleaning personnel who perform their work in the office environment, entitled to be represented by a joint health and safety committee where the number of such workers in a workplace is twenty or more?**

Section 8(1)(b)(i) has reference to office workers only, not to cleaning or maintenance staff whose work is not office work, and office cleaning personnel are entitled to be represented on a joint health and safety committee.

3. **Would the personnel of a Realty Services Branch, whose duties include survey appraisal, negotiation and acquisition of lands and buildings, land surveys and pre-lien inspections fall within the requirement for a joint health and safety committee under Section 8 of the Act?**

Yes they would but the view is that section 8(3) does not require joint health and safety committees for each branch into which a work force has been organized for administrative purposes. The solution is to have representation on the joint health and safety committee from the different branches.

Section 8(2) - Committees

1. **A Board of Education operates some 55 schools and in no school are there 20 workers as defined in the Act. Is the Board required to establish a Joint Health and Safety Committees on the basis that all schools are to be considered to be one work place?**

The writer understands that the Board maintains and operates about 55 schools at which teachers, maintenance staff, etc., are employed. In no school are there 20 workers as defined in the Act. The writer presumes that this statement is based upon the exclusion of the teaching faculty. The writer also presumes that, unlike some Boards, the Board does not have a central workshop in which a considerable number of workers work or to which they report for work assignments at the various schools.

The principle underlying the establishment of health and safety committees is to provide workers with input into job hazards and to discuss with management those matters bearing on their health and safety at work.

Assuming that the question concerns the establishment or not of a committee in respect of the maintenance staff, and assuming further that each school has its own maintenance staff, there being no interchange or assignment of a maintenance staff member from one school to another or a central workshop, it is possible to conclude that each school is a separate work place.

I point out that this possible conclusion may alter when teachers are made subject to the Act. At such time, the Board may find itself with a considerable number of committees to be established and the Board might well consider anticipating this result by establishing one joint committee now for all maintenance staff at the schools or for a school district.

Section 8(2)(a) - Regularly employed - definition

1. **What is meant by "regularly employed" in section 8(2)(a) of the Act?**

With respect to the interpretation of the term "regularly employed" contained in section 8(2)(a) of the Ontario Act, the Ministry views it as meaning those workers who are not seasonal, hired to work only during peak work periods, or students hired during their holidays. The term includes part-time workers who perform work on a regular basis. It also includes transport drivers who may spend part of their work-day away from the premises of the employer. As to employees laid off for "extended" periods, we prefer to reserve judgement until specific instances occur. Regular employment would not include employment that is casual, or temporary or seasonal. Employment that is of a regular although part-time nature is not excluded.

Section 8(2)(a) and 8(1)(b)(i)

1. **Are office staff included for the purpose of counting the number of employees under section 8(2)(a)?**

It is the opinion that one excludes from the number of workers those who are employed as office staff for the purpose of determining the number under section 8(2)(a) of the Act.

Thus, if there are a total of 30 employees, and 18 of them are office staff, there are only 12 workers that count for the purposes of clause (a).

Section 8(5) - Composition of Committees

1. **Is the appointment by the Unions of workers who have some "managerial functions" to act as worker representatives on health and safety committees in accordance with the Occupational Health and Safety Act?**

The fact that some individuals have job titles that include the word "Manager", is not the determining factor in establishing whether or not they exercise managerial functions. "Managerial functions" in the context of the Act means the powers often set out in the management rights clauses of collective agreements, that is, the right to discipline, measure the efficiency of workers, hire, promote, fire, suspend, transfer and assign workers, assign work, determine the procedures in work.

"Managerial functions" include general supervisory duties which many senior employees have. Labelling a position with a title of manager does not make the position one having "managerial functions" in the meaning of section 8(5) of the Act and such employees may properly act as worker representatives on joint health and safety committees.

The point to be made is also that the words "managerial functions" describe individuals only for the purposes of section 8 of the Act, and that concept should not be confused with the determination of who is a "supervisor" for the purposes of sections 1(26) and 16.

2. **Does the decision of the Ontario Labour Relations Board as to a worker "who does not exercise managerial functions" apply?**

The Labour Relations Act by section 1(3)(b) denies employee status for the purposes of this Act to a person who exercises managerial functions. This language is the same as that in section 8(5) and if the Ontario Labour Relations Board has in fact determined that a person does not exercise managerial functions for the purposes of section 1(3)(b), the Ministry will accept this determination as binding for the purposes of section 8(5).

3. **Does every union in a work place have to have representation on a joint health and safety committee?**

The unions as a group are to select the persons representing workers on the joint health and safety committee, and it is not intended, given the number of workers to be members of the committee, that each union is entitled to fill the positions with members of its selection. This approach would result in chaos. Having expressed this view, there is nothing in the subsection to prevent agreement among the unions being sought and obtained to allocate membership among themselves. Failing this, it seems that the trade unions in the work place, that is, the various locals, put forward their proposals for membership, and those receiving the majority support of the locals become the members of the committee.

4. **How does one select worker committee members in a continuous operation of 24 hours a day, 7 days a week in a work place?**

Persons who represent workers who are to be selected by a trade union or unions are to be selected by the trade union or unions as follows:-

For every worker so selected, two alternate workers be selected as alternate members one and two. If the member selected cannot attend, then alternate member one be entitled to act as the representative, and failing both the member and alternative member one, then alternative member two be the representative at meetings of the joint health and safety committee.

If any difficulty or objection is raised to this solution, it is possible for the Minister under section 8(3) to settle the issue by providing by order for the composition of the committee.

Section 8(8) - Inspection frequency

1. **What is the frequency of inspection under section 8(8) of the Act? Does it provide for monthly inspections?**

   It is the writer's opinion that the language of the subsection provides for inspections at a frequency not oftener than once a month, and thus the frequency of inspections permitted by the subsection could be once every month, once every two months and so on. In other words the language sets a maximum frequency rate, not a minimum.

   If the subsection had meant that inspections were to take place at least once a month, it would have stated so.

   The writer's opinion is that his interpretation is supported by the language used and by a consideration of the practical problem that would be encountered in monthly inspections of large plants. In the latter case, the designated representative would find it difficult, if not impossible, to conduct monthly physical inspections of the work place, even where he spent each month doing nothing else.

   The matter of the frequency of inspections is not left solely to the decision of an employer. Section 8(8) goes on to provide that a Director may determine the frequency at which physical inspections are to take place. This power has been exercised in appropriate circumstances in the interests of health and safety.

Section 8(12) - Payment of Committee Members (See Appendix for Interpretative Bulletin).

1. **If an employee is required to attend a meeting which does not result in any loss of pay or which may be held at a time they would not normally have worked, is the employer required to pay them for the time spent at the meeting?**

   It is our interpretation of section 8(12) that in the circumstances you describe, an hourly rate should be struck and the employee paid at this rate for the time spent at a meeting.

   In striking this rate, it is our view that the employer should take the weekly wage, divide it by the regular number of hours of work a week and thus arrive at the regular rate.

   If an employee is entitled to overtime pay for excess hours at time-and-a-half, then he would be entitled to be paid accordingly.

2. **What is the entitlement for a part-time worker, in this case a nurse, who attends a meeting on an off-duty day?**

It is our opinion that a part-time employee who attends a meeting on an off-duty day is to be paid the regular rate as if on duty for the time spent at the meeting of the joint health and safety committee.

The call-back rate provisions do not appear to be applicable. It would seem, without knowing more of the relevant wage provisions, that the time spent at a meeting after regular hours is to be paid at regular rates, in the absence of any specific provision for premium pay after regular hours. In any event there would be no minimum guarantee of hours and payment would only be for the time actually spent.

A way to avoid disputes in this matter might be to consider the appointment of alternate members in order to avoid inconvenience and cost.

Section 8(13) - Application of this Section to Non-Statutory Committees

1. **Do all committees of like nature that employers and unions formed come within subsection 13 of section 8 or only those which meet certain requirements?**

There are several factual examples which can be used to point out the circumstances under which the question might arise.

Example 1. A committee of like nature to a statuatory committee has been formed by an employer and a union or the employees before October 1, 1979, the date the Act came into force, in a work place where

(a) twenty or more workers are regularly employed, excluding office workers, or

(b) less than twenty workers are regularly employed.

Example 2. A committee of like nature to a statutory committee is formed by an employer and a union or the employees after October 1, 1979, the date the Act came into force, in a work place where,

(a) twenty or more workers are regularly employed, excluding office workers, or

(b) less than twenty workers are regularly employed.

Example 3. A committee of like nature to a statutory committee has been formed by an employer and the union or employees in a work place to which a designated substance regulation applies, and the committee was formed before October 1, 1979, or after October 1, 1979.

In dealing with the question it is necessary to deal firstly with the threshold question whether the committee that was formed was formed under a collective agreement or an arrangement or agreement and that the committee provides benefits for the health and safety of workers that equate with those to be obtained from a statutory committee.

Assuming that this threshold question is answered in the affirmative and turning to the examples it is the writer's opinion that in the case of Example 1(a), it is clear the the committee of like nature has the functions and powers conferred by section 8. Equally is it the case in Example 2(a) the committee of like nature has the functions and powers conferred by section 8 for the reason that such a committee was established by the employer to meet the statutory directive contained in section 8(2) and it must be concluded that it is a statutory committee.

With respect to both Examples 1(b) and 2(b) it is the view of the writer that, there being less than twenty workers, section 8(2) has no application, and accordingly neither does section 8(13).

In the case of Example 3, if a committee of like nature existed in a work place before the coming into force of the Act and a designated substance regulation made subsequently applies to the work place it is the writer's opinion that, assuming the threshold question is answered in the affirmative, the committee of like nature has the powers and functions conferred by section 8. Similarly as in the case of Example 2(a), it is the writer's opinion that if a committee is formed after the designated substance regulation is made and applies to the work place, such committee is to be treated as having been established to meet the requirements of section 8(2) and as having the powers and functions conferred by section 8. However, a committee formed after the Act came into force and before a designated substance regulation is made that applies to the work place does not have such powers and functions.

As you are aware, in any case where problems arise with respect to joint health and safety committees being established, section 8(3) gives to the Minister of Labour the power to order their establishment where the considerations mentioned in subsection 4 point to such action being taken.

SECTION 14 & 15

of the Occupational Health & Safety Act

Section 14(1)(a) - Duties of employers to provide protective devices, equipment. Who pays for safety equipment under this section?

1. **Does section 14(1) (a) of the Act impose a statutory duty upon the employer to provide safety shoes at the expense of the employer?**

   The answer is no, it does not.

   Section 86 of the Industrial Establishments Regulation prescribes that a worker exposed to the hazard of foot injury shall wear foot protection. This imposes the duty of wearing foot protection upon the worker but does not require the employer to provide safety shoes. If this had been the intention, section 86 would have specifically stated that foot protection shall be provided (by an employer) and worn by a worker.

2. **The Act states that the employer will ensure that safety equipment, etc., is provided.**

   Is it the intent of this section that the employer must provide the equipment or is it simply to ensure that the employer make the equipment available for purchase by the employee?

   The Act specifically requires the employer to ensure that the equipment, materials and protective devices prescribed by the applicable regulations are provided (section 14(1)(a)). As an example, the Regulations for Industrial Establishments impose upon workers a duty to wear such head, eye and foot protection (sections 84, 85 and 86) as are appropriate in the circumstances but these sections do not prescribe that the employer is to supply them.

   The practice in industry regarding who pays for such equipment varies considerably - sometimes the employer pays, other times arrangements are entered into to share costs. This matter is one left to the parties to work out amongst themselves. The Ministry's concern is that the worker wears the personal protective equipment, not who is to pay for it.

   It should be noted that where a specific hazard is present, such as a noxious gas, the present Regulations for Industrial Establishments contain a provision (section 88) which requires that a worker shall be protected by the devices prescribed. Here the regulation imposes a duty to protect the worker and it is the employer who must carry out this duty.

Section 14(2)(e) and (f) - Age of Employment

1. **Part II, Section 14(2)(f) does not allow a person under the prescribed age of sixteen years to be in or about a work place.**

The colleges operate nurseries as part of their Early Childhood Education Programs; they conduct tours of elementary and secondary school students; they offer special programs and open house to the public, etc.

Is this prohibition to be taken literally and, if so, should consideration be given to the realities of this situation in the Regulation?

Section 14(2)(f) does not set out a specific age; rather it refers to the regulations, where age requirements are set out. In view of the fact that there are no current regulations applicable to the college sector, this section of the Act does not have any force. In any event a classroom is not so far as students are concerned a work place. It also should be noted that the minimum age requirements of the Regulations for Industrial Establishments (section 4) set out a number of exceptions as to when the minimum age requirements must be met. It is probable that such exceptions would be adopted in any regulations pertaining to the college sector, and therefore I do not believe there is need for concern on this point.

Section 14(2)(h) - Posting of Act and Explanatory Material

1. **Section 14(2)(h) requires that "an employer post, in the work place, a copy of this Act and any explanatory material prepared by the Ministry, both in English and the majority language of the work place, outlining the rights, responsibilities and duties of workers". What in a University constitutes the work place? It is doubted that this section requires the University to post a copy of the Act in each office, laboratory, etc. What must a University do to comply with this Section?**

There is no requirement that a copy of the Act be posted in each work station or area. The posting of a copy in the place where the workers have access to the copy such as the time office, or the general worker assembly area or areas would answer the intent. Explanatory material prepared by the Ministry will be available for purchase in the near future. This is one of those sections in which the term "work place" is used in the general sense.

Section 15(1)(a) and (b) - Occupational Health Service

1. **With respect to Section 15 Subsection 1(a) and (b), What is meant by "occupational health service for workers"?**

This question cannot be answered until the promulgation of a regulation dealing with occupational health service. You will note that this duty is qualified by the words "as prescribed" and "prescribed" is defined in section 1 to mean by regulation.

SECTION 16 & 17

of the Occupational Health & Safety Act

Sections 16 & 17 - Duties of Supervising and Workers

1. It is our understanding that the faculty member, as an employee of the college, is under the Act and that in his/her classroom, he/she is responsible for the safety of the work place.

   Can we assume that being responsible for the safety of the work place implies a responsibility for the facility and the equipment in the facility?

   Can we also assume that if students are not concerned under this legislation - albeit under Common Law - that the employee's responsibility goes only as far as the safety of the equipment the student is using or the general safety of the facility?

   In other words, does the Act specifically apply to students in the work place or is their legal protection for their own misadventures (not that of the equipment) strictly a matter of Common Law?

   A number of assumptions are stated here. The responsibility of the faculty member under the Act for safety in the work place does not extend to the students, but to other workers. You will note that sections 16 and 17 of the Act, which set out the duties of supervisors and workers, respectively, do not impose responsibility for general work place safety, but rather speak to issues such as how workers are to work, advising workers of dangers, and so on. The general duty of maintaining work place safety is a duty imposed on the employer (section 14) and the owner (section 18). Those sections set out in very clear terms what is expected. A faculty member as an employee has the duties and responsibilities of a worker under section 17.

   With respect to the employer's responsibility for the safety of students, to the extent that they share work places and facilities with individuals who are covered under the Act, the students will benefit from the standards set under the Act and applicable regulations. The primary duties of the employer or faculty member to the students are imposed by the common law. As stated above, the Act does not apply to students.

2. Who is responsible as a supervisor under section 17?

   Section 17 imposes duties upon a supervisor. These duties are similar to those imposed upon the employer. In addition, by section 14(2)(b) the employer must, when appointing a supervisor, appoint a competent person, and section 1(2) defines a competent person. I do not share the view that a journeyman instructing an apprentice in the trade, or a working lead hand is selected and appointed as a supervisor to exercise the responsibility contemplated by these provisions.

In addition, a person who supervises is a part of the management chain and his decisions reflect management's policies with regard to not only instructing other workers what to do, but how to do the work, and in what circumstances the work should or should not be done, and by disciplining or reporting a worker for discipline for failure to carry out proper procedures.

The problem is a factual one which depends for its solution in individual cases in determining whether a person has charge of a work place or authority over a worker. The answer will as a general rule be found in inquiries into the responsibilities delegated to and exercised by a person in order to conclude that he was acting for and on behalf of management and exercising management's authority over the work place or over other workers.

Section 17(1)(e) - Payment for Workers' Medical Examinations and Tests

1. **Who pays for workers time taken to have examinations, tests and X-rays?**

Do the provisions in the Act require the employer to pay a worker for the time taken to attend to have such examination, test or X-ray?

The language of section 17(1)(e) is clear in requiring an employer to pay whatever costs or fees are imposed for the medical examination, test or X-ray but the section is silent as to whether the employer is to pay for the time off work that is taken by a worker to have the medical examination, test or X-ray. Accordingly, it seems that the Act does not impose an obligation on the employer to pay the worker for such time. The answer cannot be found in the Act, but must be sought in the terms and conditions of employment.

SECTION 20

of the Occupational Health & Safety Act

Section 20(4) - What Unions are aggrieved by an order under section 20(1)?

1. **Can a union or a local other than the one representing workers who are directly affected by an order made under subsection 1, be aggrieved by an order and appeal the order?**

   The answer is no. If it were otherwise, then one would have a situation in which several unions in several work places could object to an order made with respect to a work place with which the unions have no direct relationship.

Section 20 - Toxic substances - Orders or Directions

1. **Where a biological, chemical or physical agent or combination thereof, is used for experimental purposes in laboratories, may a director of the Ministry of Labour indicate the use, and or presence of the above in view of the fact that its purpose is experimental?**

   Section 20 of the Act answers your question. The Act does not explicitly refer to the purpose for which a biological, chemical or physical agent or combination thereof may be used or is intended to be used in setting out the powers of the Director. The Director takes into account the factors listed in section 20(7). Because agents, the uses to which they are put and the quantities handled vary, there is no broad rule which can be applied beforehand. You are best advised to ask the Ministry for advice in respect of specific agents being used or intended to be used.

SECTION 21

of the Occupational Health & Safety Act

Section 21(3) - Definition of new agent or combination of agents

1. **What is the definition of a new agent or combination of agents under subsection 3 of section 21?**

In applying subsection 3 of section 21 it is the Ministry's interpretation that a new agent or combination of agents means an agent or combination of agents other than one in use on October 1, 1979, or an agent or combination of agents that is not included in the inventory adopted in January, 1981, published by the Administrator of the Environmental Protection Agency under The Toxic Substances Control Act which was adopted by a Ministerial order published as Regulation 693, R.R.O. 1980.

While the subsection as published uses and instead of or it is the Ministry's position that this renders the subsection meaningless and ineffective and that the subsection should be read as if "and" in the second last line read "or".

The further problem raised is what is a new combination of agents. It is the Ministry's position that a combination of agents is new,

(a) where it consists wholly of new agents only,

(b) where it consists partly of new and old agents, and

(c) where it consists wholly of old agents which have not previously been combined and used.

Specifically, a combination will not be "new" if it is a combination of agents which have previously been combined even though the proportions of each agent in such a combination are different than the proportions in previous combinations.

SECTION 23

of the Occupational Health & Safety Act

Section 23(3)(b) - Refusal to Work

1. **What is the difference in a refusal to work situation between Bill 70 and Bill 139?**

The Occupational Health and Safety Act, (Bill 70) now contains quite different wording to deal with the work refusal situation. Bill 139 contained the phrase "reasonable cause to believe" and relied upon that standard throughout the processing of a work refusal made under section 3 of that Act. On the other hand, section 23 of the Act adopts the standard "reason to believe" to measure the appropriateness of an initial refusal under the section and then the obviously more objective test of "reasonable grounds to believe" is employed after the employee's concern has been investigated. During the review of the proposed legislation, these two standards were referred to as requiring a two-stage procedure, i.e. the "feeling stage" represented by the standard "reason to believe" and a more objective second stage "requiring some concrete evidence that the worker, having gone through the investigation process, believed that there remained an unsafe condition." (See Hansard, Government Bill 70, 1st Session, 31st Parliament, p. 6210). While it is, of course, for the Labour Board to determine, this change in wording is significant. The section conveys an explicit legislative intent to tighten the scrutiny given to work refusals after an initial investigation.

2. **Can a person under the Occupational Health and Safety Act be considered unsafe or a danger to other employees and justify a refusal to work?**

You have asked whether other workers could be the cause for a refusal within the terms of section 23(3) of the Act. The answer is no, they cannot - the wording does not extend so far. You may wish to note, however, that a worker has a duty in section 17(1)(d) to report to his employer or supervisor the existence of any hazard of which he knows; this provision can be of assistance in situations such as the one you mention. Generally, problems with other workers are most effectively handled through regular management-employee channels, such as training courses or disciplinary action.

3. **In order to prevent abuses of this Act, can an employer discipline an employee who makes a frivolous claim in that the claim is turned down by employer investigation and inspector investigation?**

With respect to your question on employer reprisals (section 24 of the Occupational Health and Safety Act), it is a management prerogative to discipline workers who frivolously exercise the right to refuse. However, the employer should be aware that the determination of what is frivolous and what is not may become the subject of an inquiry by an arbitration hearing or the Ontario Labour Relations Board, pursuant to section 24(2).

Section 23(1)(a) - Application

1. **Are security guards who are members of a university security force within clause a of section 23(1), "employed in or as a member of a police force to which the Police Act applies"?**

I am of the opinion they are not within the exemption. The Police Act applies to municipal police forces and the provincial police force, and not private security officers who are employed to furnish security services to their employer. Thus, such security officers are entitled to exercise a right of refusal to perform unsafe work in circumstances within the section.

Section 23(3) - Bomb Threat

1. **Can a security guard exercise a right to refuse unsafe work where a note is found stating a bomb is on the premises and he is asked to participate in a search?**

The answer is not a simple one. The note may be summarily dismissed as the work of a "prankster" or may be taken as the work of a terrorist who means what is said. One would have to take into consideration the circumstances surrounding the note such as its contents, its location where found, possible author, and so forth. At some point a decision will have to be made whether to evacuate the building, to organize and conduct a search for any unidentifiable or strange object or package, and if located, its handling and disposal. As stated, the guard must have reason to believe a bomb is present and this comes to the question whether the note is in itself a sufficient reason to believe a bomb is present. In Northern Ireland, Britain, France, Germany and Italy such a note would, because of past events, be sufficient in my view. In Canada, I venture that a note is insufficient unless there has been a background of tension or fear prompted by threats or actions. The last word on the reason for believing a danger from a bomb existed will belong to an arbitration board that is called upon to decide whether disciplinary action for refusing to participate is proper.

Section 23(2) - Application to group homes

1. **What is the distinction between subsections (1) and (2)?**

The Ministry views clause c of subsection 1 as being applicable to custodial institutions, such as correctional centres, training schools and detention and observation homes. In such situations, the inmates are locked in and must necessarily be completely dependent upon the staff for care, attention and protection.

Clause 2 of subsection 2 on the other hand applies as it states to residential group homes where the residents are provided with shelter and food, but are not locked in and therefore not undergoing confinement.

Section 23(2) and (3) - Right to Refusal Provisions as they Relate to Facilities for Adult Retardents

1. **Can workers in an adult retardation facility refuse to work in situations where residents are unstable and violent and require physical restraint?**

The refusal to work provisions in section 23(3) are related to situations where:-

(a) the equipment, etc., to be used or operated is a likely danger;

(b) the physical condition of a work place is a likely danger, or

(c) there is a contravention of the Act or the regulations in respect of the equipment or the physical condition of the work place.

Subject to what is said later, the inquiry as noted above is not related to any one of the three above described situations. It is related to the conduct that is likely to be anticipated from those residents whom the worker has been employed to deal with for their own protection and the protection of others. As such none of the above clauses are applicable and a refusal to work in such situations is not justifiable under them.

It should be noted that section 14(2)(g) places upon an employer a duty to take every precaution reasonable in the circumstances for the protection of a worker. If a breach of this clause is established, it follows that a contravention of the Act has occurred.

2. **Can a worker refuse to lift a patient who is very obese, without aid?**

This situation is not within section 23(3) clauses a, b or c which deal with equipment that is a danger, the physical condition of the work place or subject to what follows, a contravention of the Act or regulations.

An employer is under a general duty both at common law, and by section 14(2)(g) of the Act to take all reasonable precautions for the protection of a worker. Thus, if the employer requires an employee to perform heavy work such as lifting an obese patient and the consequences are the probability of injury to the worker, both the common law and section 14(2)(g) may be breached. It is not, therefore, inconceivable that in the situation you put there may well be justificatin for refusal to lift such a patient without other assistance. The circumstances will determine the issue.

Section 23(12) - Payment for time on a Work Refusal. (See Appendix, Interpretative Bulletin)

SECTION's 25, 26, 27

of the Occupational Health & Safety Act

Sections 25 & 26 - Notices of accidents

1. **Does the Ministry require notice of an accident where only minor injury is sustained by a person at work and such injury does not require medical attention, nor result in temporary lay-off from work beyond the day of the injury, as is provided by the Workmen's Compensation Act of Ontario?**

   Section 25(1) requires an employer to give notice of every occasion where a worker is killed or critically injured. Reference should be made to section 5(1) of Ontario Regulation 658/79 for the details required to be given.

   Section 26(1) requires an employer to give notice of every occasion where a worker is injured to such an extent as to be unable to perform his usual job or requires medical attention. A similar duty is imposed in cases of occupational illness by section 26(2). Reference should be made to section 5(2) of Ontario Regulation 658/79 for details to be given in the notice. The phrase "medical attention" in section 26(1) does not include first aid treatment as it is commonly understood, but treatment of an injury by a medical practitioner.

Section 25(1) - Notification of Critical Accidents

1. **What is the meaning of "critically injured"?**

   These words refer to an injury from which there is a strong possibility that death may ensue.

   It should not be restricted to an injury from which death must ensue, or an injury from which death will in all likelihood ensue.

   The foregoing accords with past practice. It is not a problem of legal construction, rather a problem of practical observation at the time.

   It involves a matter of observation taking into account the cause of the injury, e.g. a fall; a falling object; a noxious gas or substance; an amputation, and so on, and the injury thereby caused. If the injury is not visible, but internal, then it should be considered a critical injury if caused by a fall, a falling object or noxious gas, etc.

   One should consider that it is not the purpose of the sections to require investigations into all injuries - even though of a serious nature but not involving the possibility of a fatal result. Certainly, all work is not required to stop, under section 25(2), just because of an injury albeit of some severity. It is a matter of degree and the degree should be severe enough to raise a possible doubt as to survival.

Section 29(6) - Orders by Inspectors

1. **Does the word "person" apply only to workers or the employees in a work place? Or should inspectors provide material directly to a trade union requesting it rather than refer them to the employer for information?**

   The language is plain and the construction is that the word "person" at the end of the section refers to the individual worker or the union who has in fact complained of a contravention. The words "cause a copy thereof to be furnished" mean that the inspector can be selective about the manner in which the copy is furnished to the complainant, i.e., by mail, by a fellow worker, by a trade union, or by leaving it with a person to give to the complainant. The intent is to select the appropriate means so that the complainant will get the copy.

SECTION 34

of the Occupational Health & Safety Act

Section 34 - Requests for Ministry Information

1. **Can a person obtain copies of investigation reports upon request?**

   It is the policy of the Ministry of Labour not to disclose reports of investigations, information, and statements obtained by inspectors of the Division under the Occupational Health and Safety Act, except for the purposes relating to the forwarding of the policies of the Act. These do not include assistance in inquiries which are being made with a view to private litigation or the consideration of civil liability. Requests for any such reports, information and statements cannot be granted.

Regulation Respecting Lead - made under the Occupational Health and Safety Act

1. **How would the Lead - Designated Substance Regulation be implemented in Schools?**

The Regulation applies to an employer in whose work place lead is present and at which a worker is likely to inhale, ingest or absorb lead. If this is in fact the case, the employer under section 6(1) is to do an assessment of the exposure of workers to lead. Following upon the assessment, a lead control program for those workers in a lead exposure is to be established. Disputes about the assessment or the program are to be referred to an inspector who gives a decision. An appeal from the inspector's decision may be brought under section 32.

Where a question arises whether the Regulation has application to a work place and the issue concerns the establishment of a joint health and safety committee in the work place under section 8(2)(b), it is the Minister who has the power of decision under 8(14).

A dispute as to the making of an assessment of lead exposure and the content of a lead control program is, under the Lead Regulation to be referred to an inspector who may investigate and make a decision thereon.

APPENDIX

INTERPRETATIVE BULLETIN ON SECTIONS 8(12), 23(12) and 28(5)

Payment to Committee Members

Section 8(12):- A member of a committee is entitled to such time from his work as is necessary to attend meetings of the committee and to carry out his duties under subsections 8 and 9 and the time so spent shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper.

Payment to a Person on a Refusal to Work

Section 23(12):- The time spent by a person mentioned in clause a, b or c of subsection 4 in carrying out his duties under subsections 4 and 7, shall be deemed to be work time for which the person shall be paid by his employer at his regular or premium rate as may be proper.

Payment to a Person Accompanying an Inspector

Section 28(5):- The time spent by a committee member representing workers, health and safety representative or worker selected in accordance with subsection 3 in accompanying an inspector during his physical inspection, shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper.

It is noted that there is some difference in wording between section 8(12) and sections 23(12) and 28(5). The latter require payment for "time spent." The first requires payment for "time so spent." It is our position that all the subsections are to receive the same interpretation. Thus, by section 8(12) all time spent in attending meetings and in carrying out the duties mentioned is deemed to be work time. Similarly, all time spent at investigations into a refusal to work and in acompanying an inspector under section 23(12) and 28(5) is deemed to be work time. The deemed work time is to be paid for at the appropriate rate for the person.

The foregoing is more fully developed in what follows in the form of questons and answers.

1. By section 8(12) is a committee member entitled only to be paid for time lost from work and not where the time spent at meetings, inspections and investigations takes place after working hours, or during time off work?

2. By section 23(12) and section 28(5) is the person entitled only to be paid for time lost from work and not where the investigation or inspection takes place after working hours or when the person is off work?

3. What is the meaning of "regular rate"? In particular what rate of pay is applicable where a travel time rate, a holiday rate of pay; a bonus or production rate or incentive pay in addition to a minimum hourly rate, or in lieu thereof, etc., exists?

4. What is the meaning of "regular rate" where a worker is paid a daily, weekly or monthly wage for his daily, weekly or monthly work without an hourly rate being specified and the time spent is during his daily, weekly or monthly hours or after his normal working hours?

5. What is the meaning of "premium rate"?

Answer to 1

The employer is to pay a committee member for all the time spent at meetings, inspections and investigations as though it were work time whether such time is spent during actual working time, after working hours or when off work.

Answer to 2

The answer to 1 applies and all time spent is to be paid for as work time.

Answer to 3

Where the employment arrangement sets out an hourly rate for work during regular or normal hours and the time is spent during such hours, that is the rate to be applied. Where the employment arrangement provides for different rates of pay for different activities such as travel time, or provides for a minimum hourly rate plus bonus or production or incentive pay or for production or incentive pay alone, and the time is spent during work hours or after work hours, the rate to be applied is that rate referrable to work time only, not the travel time rate. Where the rate of pay involves bonus, production or incentive pay, the regular rate is determined by taking the amount of pay the person received in a daily, weekly or monthly period when at work and dividing that amount by the hours he worked in the daily, weekly or monthly period to earn the amount of pay he received. The result obtained represents the person's regular rate. Such a method will, if the period used is a normal reflection of the person's hours and work time, give the regular hourly rate of the person.

Answer to 4

The regular rate is calculated by taking the total pay of the person for the day, week or month, excluding any special payments and dividing this amount by the regular hours of work in the day, week or month. The result obtained is the regular rate for an hour of work.

Answer to 5

Premium rate is the rate an employee is entitled to receive for work after regular working hours.

It does not refer to those rates paid for call-back time or stand-by time but has particular reference to overtime pay.

When the time spent is after regular work time, the question whether it is to be paid for at the regular or premium rate will depend upon the terms of employment. Employment contracts may require payment of a premium or overtime rate after 8 hours a day or 40 hours a week. The time spent is added on to the daily or weekly work time and is paid accordingly.

Where an employment contract does not provide for a premium or overtime rate, reference is made to The Employment Standards Act, 1974, section 25, which requires payment of overtime pay of one-half times the regular rate for hours of work after 44 hours in a work week.

Disputes as to Payment

Where a dispute as to payment to a person arises, there are several options for resolution.

An order for a contravention can be issued under section 29(1) setting out the name of the person, the amount he is entitled to be paid and such particulars as are required. If the order is not complied with or not appealed by the employer under section 32 of the Act, a prosecution can be commenced under section 37.

As an alternative to the issue of an order under section 29(1), or where the order is issued and not complied with, the matter may be referred to the Employment Standards Branch for wage collection by the person and the Employment Standards Branch may issue an order to pay. By The Employment Standards Act, an employer can, upon paying the amount ordered, apply for a review to a referee. The referee hears the evidence and the argument and may revise, reverse or uphold the order.

OCCUPATIONAL HEALTH AND SAFETY ACT

Interpretation Opinions

of

Legal Branch, Ontario Ministry of Labour

Supplement to April, 1982

September, 1982

Section 1(26) Definition of Supervisor

Is a journeyman instructing an apprentice a supervisor? Is a lead hand a supervisor?.

1. There are problems which arise in treating a journeyman who is instructing an apprentice as a supervisor under the Act, or a lead hand in a similar fashion.

   Section 17 imposes duties upon a supervisor. These duties are similar to those imposed upon the employer. In addition, by section 14(2) (b) the employer must, when appointing a supervisor, appoint a competent person, and section 1 (2) defines a competent person. I do not share your view that a journeyman instructing an apprentice in the trade, or a working lead hand is selected and appointed as a supervisor to exercise the responsibility contemplated by these provisions.

   In addition, a person who supervises is a part of the management chain and his decisions reflect management's policies with regard to not only instructing other workers what to do, but how to do the work, and in what circumstances the work should or should not be done, and by disciplining or reporting a worker for discipline for failure to carry out proper procedures.

   The problem is a factual one which depends for its solution in individual cases in determining whether a person has charge of a work place or authority over a worker. The answer will as a general rule be found in inquiries into the responsibilities delegated to and exercised by a person in order to conclude that he was acting for and on behalf of management and exercising management's authority over the work place or over other workers.

   When the problem is approached on this basis, it is difficult to conclude that a journeyman or a working lead hand is acting for and on behalf of management.

   I note your comment that Ministry inspectors "are treating union sub-foremen or lead hands as supervisors on the job and have charged them thusly". I am not aware of any particular instance of this. Perhaps you might be able to provide examples. In the meantime, I will raise the matter with responsible officials within the Occupational Health and Safety Division and will advise you if, as a result of my discussions, I have any further observations to make.

2. I acknowledge receipt of your letter in which you inquire about the practice of the Utility delegating to a sub-foreman or lead hand responsibilities for safety.

A supervisor is by section 1(26) defined as a person who has charge of a work place or authority over a worker.

Whether a lead hand or a sub-foreman is a supervisor within this definition is a question of fact. The answer to this question will depend upon inquiries into the responsibilities and duties which are delegated to and exercised by the lead hand or sub-foreman so that a conclusion can be made that he was acting for and on behalf of management in the exercise of these duties and responsibilities. I am advised that the inquiry would include such things as whether the delegation included the right to issue instructions what was to be done, how the work was to be done, and also power to discipline or recommend discipline.

I am therefore unable to give a categorical answer to your question whether a sub-foreman or lead hand is a supervisor under the Act and as such is responsible as a part of management under section 16 of the Act.

3. You have asked whether "lead hand" are "supervisors" for the purposes of section 1(26) of the Occupational Health and Safety Act, 1978.

Generally, a lead hand or working foreman is not in charge of a work place, nor does he have authority over a worker in the sense of being able to order, discipline, hire or fire. There may be exceptions. It will depend upon the particular functions assigned to such persons.

An examination of the job duties and responsibilities attached to your letter indicates to the writer that the duties and responsibilities are not those of a supervisor within section 26(1), presuming that these are in fact the ones assigned.

Is a Group Leader a Supervisor?

It appears that a group leader is in the position of what may be generally called a lead-hand or working sub-foreman. He sees to it that the work is being carried out by the employees in his group, has no supervisory powers such as recommending promotion, discipline, dealing with employee complaints, or scheduling work time or leaves of absence. It is noted that the group leaders are hourly rated employees and within the bargaining unit.

By section 1(26) a supervisor is defined as a person who has charge of the work place or authority over a worker. The authority required must be of a supervisory nature delegated by management including such matters as the issuing of orders,

instructions and being able to require such orders and instructions to be obeyed. This authority would be required in order that the person meet the duties imposed upon him by section 16 of the Act.

In further support of this viewpoint, it is noted that a supervisor acts for and on behalf of management during the first step in connection with a refusal to perform unsafe work as provided by section 23(4).

It is the writer's opinion that a group leader performing functions such as set out in your letter is not a supervisor.

Section 1(29) Definition of Worker

Are trainees in the Ontario Career Action Program (OCAP) workers and as such within the Occupational Health and Safety Act.?

OCAP is directed to assisting young persons (trainees) between 16 and 24 in obtaining permanent jobs after leaving schol by having employers (trainers) participate in a training program for individual young persons.

The intended trainee applies to a Community College to enter the program. The community college through its OCAP co-ordinator approves the intended trainee for entry into the program, and selects training employers. These employers are brought into the program by OCAP through active recruitment or on their individual application to become a training employer.

An individual training program is developed for each trainee with the training employer, such program to consist of not more than 16 weeks of training.

The training employer keeps a record of performance and attendance and reports are made to the Community College co-ordinator.

During the training program, the employment of the trainee by the trainig employer as part of his regular work force is prohibited and no payments or wages can be made or paid to the trainee by him. The College pays the trainee an allowance of $100 per week.

The selection of a particular trainee to be trained by a particular training employer is made through a consultative process between the college co-ordinator and the training employer in which several prospective trainees selected by the College are sent to the training employer for interview and final selection by the latter.

Discipline or removal of a trainee from the training program can be initiated by the training employer, the college co-ordinator or upon a complaint by the trainee. The termination of the individual training program is the right of the college.

The ultimate objective is the permanent employment of the trainee by the training employer, or some other employer in the work in which the trainee has been trained. There is no obligation upon the training employer to permanantly employ the trainee.

This general outline of the main features of OCAP is fleshed out in a document called a Participation Agreement which is entered into by the College, the trainee and the training employer.

Relevant provisions of the agreement are:

> The college agrees to give work experience to the trainee, and the training employer agrees to provide the location, resources, and expertise for training. The College and the trainee are bound by the provisions of the Workmen's Compensation Act, C.P.P., U.I.C. and I.T.A. and the College is to be considered the employer for the purposes of such legislation. The trainee will receive $100 weekly from the College plus vacation pay and the training employer cannot supplement the allowance. The agreement can be terminated at any time upon notice by any party during its term. The hours to be spent are those in the training program not to exceed 40 hours a week. The training employer cannot use the trainee to displace any regular full or part-time employee. Health and safety during the training period is the responsibility of the training employer and the trainee.

The Occupational Health and Safty Act is legislation of general application to employers and workers governing occupational health and safety at work. The immediate question is does the Act apply to govern the health and safety of trainees in the location of the training employer and if so upon whom are the duties of an employer cast, the College or the training employer.

It is noted that the Act's application is not universal. There must be an employer who employs one or more workers and there must be a worker who performs work or supplies services for monetary compensation.

On a broad view of the relationship created by the OCAP between the College, the training employer and the trainee the fundamental function appears to be one of an educational work experience and not work performed in the training employer's organization. The writer presumes that there would be considerable evidence available to support this broad view. The training employers could show that trainees are not essential to the organization's functions, and are supernumaries to such functions.

There is another view which can be taken which is that the development of trained workers is an essential feature for the continued functioning of the training employers' organization and OCAP is a cost-saving device to employers to create for them at no expense a pool of trained workers or a prospective employee who will upon acceptable completion of the program be permanently hired with the possible result of displacing an existing employee.

The trainee meets the worker definition in clause 29 of section 1 of the Act in that he is working in a training program and is in receipt of monetary compensation for doing so. The situation is not novel, it exists in professions which require students to receive practical training at some point during their education in order to qualify, and is the case in every trade having apprenticeship.

The thorny problem is that under the Act there must be co-existing with the worker an employer in order that the Act apply. In OCAP the question is really who is the employer, the College or the training organization.

Under the Participation Agreement, the College is the employer for the purposes of workmen's compensation, and the other legislation above mentioned and pays the allowance, and the training employer agrees to comply with the provisions of the Ontario Health and Safety Act (sic).

To place upon the college the responsibilities of an employer under the Act to the trainees as their workers would lead to all kinds of impossible situations. How, for example, could the college intervene in work practices and processes being carried out in the premises of the training employer. The conclusion is that the college is a notional 'employer' under OCAP, not an employer in fact.

Turning to a consideration of the status of the trainig employer under OCAP it is equally apparent that there are difficulties in concluding he is the employer of the trainees for the purposes of the Act. He does have some of he attributes of an employer in fact - he selects the trainee, can terminate or remove the trainee, schedules training time, gives work training assignments, has the right to control the training and evaluates the progress of the trainee. However, the training employer cannot pay the trainee any compensation during the training period, nor can be enter into any employer-employeee contract of service during this period. He also cannot use the trainee as a replacement for his regular workers. At the same time, it is the training employer who is in control of work practices and processes in the work place and who can intervene in and direct the manner in which work is carried out. It is apparent that for the purposes of the Act, it is the training employer who alone can meet and fulfil the statutory duties and responsibilities placed upon employers for the protection of the health and safety of trainees in OCAP.

It is my conclusion that the relationship established between the trainee and the training employer contains sufficient elements to permit the conclusion that for the purposes of the Occupational Health and Safety Act, the employer is subject to the responsibilities imposed by the Act and the regulations upon an employer in respect of the trainee.

Section 7(1) of the Act - Selection of Health and Safety Representatives

The question asked is who selects the health and safety representatives on a construction site.

The answer is found in section 7(1) and 7(5) . The obligation is imposed on the constructor to cause the selection of such a representative to be made from among the workers. Where there are trade unions on the job site, the constructor is to have the trade unions select the health and safety representatives.

Section 9 of the Act - Summary of Accident and Illness Statistics Distribution by the Workmen's Compensation Board.

Are next of kin to a worker fatally injured, entitled to statistical summaries of accidents at a workplace, under section 9 of the Act?

Section 9 of the Act limits the request for the informatin to those mentined and these do not include next of kin.

The purpose of section 9 was to enable those interested in respect of their employment at their work place to make inquiries. Obviously, a worker for one is interested in the injury statistics as these give a guide as to how well his employer meets his obligations under the Act and can be used to good purpose. An interest by next of kin is not of this kind and action to reduce injuries is not contemplated nor possible.

Section 23(3) (b) and (c) Refusals to Work - Meaning of Physical Condition of work place.

What do the words "the physical condition of the work place", as found in paragraphs (b) and (c) of subsection 23 (3) of the Act, mean?

You have asked for an interpretation of the words "the physical condition of the workplace", found in paragraphs (b) and (c) of subsection 23(3) of The Occupational Health & Safety Act, 1978. Notwithstanding what you may have been told on the telephone, in my opinion these words refer to hazards inherent in the structure of the work place or hazards created as a result of the presence of varius substances or things in the work place.

This would include biological, chemical or physical agents present in the work place and carbon monoxide would be included in that group.

Section 24 of the Act - Reprisals by Employers
Section 133(1) of O. Reg. 658/79 - Work place air temperature

Can an employer discipline an employee who makes a frivolous claim when the claim is turned down by the employer?

With respect to your question on employer reprisals (section 24 of The Occupational Health and Safety Act, 1978), it is a management prerogative to discipline workers who frivolously exercise the right to refuse. However, the employer should be aware that the determination of what is frivolous and what is not may necessitate the holding of an arbitration hearing or a hearing before the Ontario Labour Relations Board, pursuant to section 24(2).

OCCUPATIONAL HEALTH AND SAFETY ACT

Interpretation Opinions

of

Legal Branch, Ontario Ministry of Labour

Supplement to September, 1982

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FORWARD

This is a compilation of edited legal opinions which have been given from time to time by the Legal Branch of the Ministry of Labour in response to questions put by workers, trade unions, employers, the inspectorate and senior staff of the Ministry. The opinions are the interpretation by a member of the Legal Branch of language and provisions in the Occupational Health and Safety Act and regulations.

The edited opinions do not have binding effect but are intended to provide answers to questions asked in the context of a specific fact situation. They are being used by staff of the Ministry to assist in the administration of the Act, and may not be applicable where the facts are dissimilar.

It is unnecessary to point out that questions of construction and application will find their ultimate answer given by the courts where a contest ensues as to construction or application of a legislative provision.

Application of Act to Construction Workers on Military Bases

What is the extent of a provincial inspector's jurisdiction on a Canadian Military Base? Should Ministry inspectors sign an admission register for entrance to job sites?

The situation is that a defence contractor is engaged in land clearing, earth moving and construction within the confines of a defence establishment. Entry to the establishment and thus the construction project is regulated and controlled under the National Defence Act and regulations promulgated thereunder.

The regulations require that passes be obtained before access to the defence establishment will be permitted.

The passes purport to impose a condition that there will be no liability for personal injury, etc., suffered by the person to whom the pass is issued while on the the premises.

The Occupational Health and Safety Act by section 28(1) confers upon an inspector power to enter upon any workplace for the purpose of carrying out his powers and duties under the Act, i.e., inspect construction projects to see if the provisions of the Act and regulations respecting the health and safety of workers are being complied with by constructors, employers and workers.

There is little doubt that provincial safety legislation, the Occupational Health and Safety Act, applies to the construction in question even though such work is being carried on within the defence establishment.

There is a conflict between the National Defence Act and its regulations and the Occupational Health and Safety Act. The former provides for the limiting and controlling of access to defence establishments and the latter gives statutory right of access to workplaces to an inspector.

The general rule of constitutional law is that where a valid federal and a valid provincial enactment are in conflict the federal enactment prevails over the provincial enactment. Accordingly, the right of entry of one of the Ministry's inspectors would be limited or controlled by the federal Act and regulation.

Accepting this, Legal Counsel sees no good reason why the permit given should be subject to the conditions of waiving all rights in case of damage or injury or the indemnity of others. The inspector is not a casual visitor but a public officer who is carrying out a statutory duty.

It is the conclusion of Legal Counsel that the inspector should sign an admission register and obtain permission to enter but should not as part of receiving such permission be asked or required to waive all his rights for damage or injury or agree to indemnify others.

Section 1 (4) of the Act - Meaning of Constructor

Is an employer who engages two unrelated contractors under two different contracts to perform two separate and distinct undertakings in a building a constructor and thus required to appoint a supervisor?

The Occupational Health and Safety Act defines a constructor to include an owner who undertakes all or part of a project by himself or by more than one employer (contractor).

In this situation an owner engaged two contractors to effect repairs to a building; one contractor doing one part of the work and the other another part. The work was on the same floor and the two contractors were engaged at the same time.

The owner undertook the project by engaging more than one contractor and became a constructor.

The rationale for the provision is that where there are several contractors on a project someone must have overall responsibility for the safety of workers and co-ordinate the various operations. At the same time each contractor has responsibility for the safety of his workers. See sections 13 (constructor duties) and sections 14 and 15 (employer-contractor duties).

There are circumstances in which a project can be 'carved up' into distinct and separate parts, each part being done by a 'constructor'. For example, a sewer project may involve trenching and tunnelling. Each of these is dealt with separately in space with distinct lines of demarcation. Also, a project may involve several phases, separate as to time but not space. In such situations the Director of Construction Safety would exercise his power under Section 4 (7) of the Regulation for Construction Projects.

Section 1 (8) - Definition of Employer

Who is the employer in a municipality - the Mayor and Council; the Administrator or Manager or a Department Head?

Under section 7 of the Municipal Act, the inhabitants of every county, city, town, village and township are made a body corporate. Thus each county, etc., is a corporation under the management of a council composed as the Municipal Act provides and having such officers as that Act provides.

Accordingly, the employer is the municipal corporation, not an elected or appointed official. The latter may be supervisors depending upon their powers to issue orders to workers or to take charge of a workplace of the municipal corporation. The latter are not employers.

Section 1 (28) of the Act - Definition of workplace.

Is an ambulance a workplace?

The definition of workplace is comprehensive and includes vehicles or other equipment operated by workers, including an ambulance.

Section 2 of the Act - Application of the Act to a worker of an Ontario firm working outside the province

Would the appropriate sections of Ontario's Occupational Health and Safety Act apply to a truck driver who on a run from Sudbury to a town in Quebec, was involved in a motor vehicle accident in Quebec and is fatally or critically injured?

In this case, the first issue is whether the truck driver was engaged in an interprovincial enterprise. If his employer's business falls into this description, the Ontario Act has no application, and the duties and responsibilities of employer and worker are subject to the Canada Labour Code.

Assuming that this was an isolated activity or one that occurred only occasionally and the truck driver is employed in a provincial enterprise, the issue is whether the duties and responsibilities imposed by the Act apply where the death or injury occurs in another province.

The principle is that an Ontario statute has no application beyond the territorial boundaries of the province. Thus, the Occupational Health and Safety Act would not confer authority upon an inspector or a committee member to conduct an investigation outside Ontario. The result is that a highway accident occurring in Quebec could not be investigated.

There is one matter that could be investigated in Ontario and that is the state of maintenance of the equipment, where the circumstances are such that this was the cause of the death or injury.

Section 3(2) of the Act - Farming Operations

If an employer has a hatchery operation which includes the raising of chickens, and the growing of grain to feed these chickens for the purposes of processing them into food stuffs, would all parts of this operation be considered a farming operation?

Such an operation is not a hatchery operation only. The milling of grain for feed may be considered a separate operation which is not usually included in farming operations in the ordinary meaning of such words. The same may be said of the processing plant. The point is that because a person carried on vertically integrated operations, all the individual components of such operations do not partake of the same character as the first or primary component. To put it another way, the company's major role is the processing of the products of farming operations into food. In raising chickens it engages in farming operations but in making feed for and in processing the chickens it is not engaged in farming operations.

Section 8 (1) of the Act - Representation of Office Workers on Joint Health and Safety Committees

Situation: An employer requests office staff to provide a worker representative for the joint health and safety committee. The union lodges a complaint on the basis of section 8 (1) (b) (ii) which states "this section does not apply to an employer in respect of those workers who work, in that part or those parts of a building used for office purposes". The employer believes that this section does not prohibit him specifically requesting office staff representation and believes he is exceeding a minimum performance standard.

(1) Is an employer in contravention of the Act by requesting office staff representation on a joint health and safety committee?

Under section 8 (1), subject to a Minister's order under subsection (3), section 8 has no application in respect to those workers working in that part of a building used for office purposes. Such workers are therefore excluded in determining whether there are twenty or more workers for the purposes of subsection 2.

If the employer requests office staff representation on the statutory committee he is contravening section 8 in respect of the composition of the committee.

(2) Is the employer exceeding a minimum requirement?

Section 8 (2) imposes a requirement for a statutory committee where a committee under a collective agreement or an arrangement does not provide equal or greater benefits. In the latter case there is to be an agreement.

(3) Would it be a contravention if the non-union or union workers decided they wanted a representative from the office staff for their committee?

If the union workers agreed to office staff representation on the committee as does the employer there would not be a contravention. At the same time if the non-union workers demanded representation it would appear that the solution would be to either form a small committee to deal with the office workers alone or else an application could be made to the Minister under subsection 3 to order a committee with the representation to be set out in the order.

Section 8 (1) (b) (vi) of the Act - Place of Entertainment

What do the words "place of entertainment" mean in the context of subclause 8 (1) (b) (vi) of the Act?

Subclause 8 (1) (b) (vi) provides that subject to a Minister's order under subsection (3) section 8 does not apply to a theatre or place of public entertainment.

The words 'place of entertainment' are capable of a broad meaning when considered by themselves. Generally they would refer to any place where means of entertainment would include, for example, an arcade, bowling alley, an exhibition of some kind such as a sport or game, festival, circus, midway, a golf course or a race track.

The words are capable of a narrow meaning if they are considered to apply to places that are of the same genus as a theatre. In other words, is the meaning of 'place of entertainment' circumscribed by the requirement that it is a place having characteristics in common with those of a theatre or being of a similar type, such as a music hall, moving picture theatre, or a performance in an auditorium or other building.

In determining which approach to take, consideration is to be given to the purpose and object of the Act and to the other provisions of clause 8 (1) (b).

The Act's purpose is to provide for the occupational health and occupational safety of workers. One of the chief ways in which this purpose is to be achieved is the establishment of health and safety committees composed of representatives of workers and management which committees have the functions set out in subsection (6). The establishment of such committees is not required in those cases specified in subsection (1). Clause (1) (b) mentions seven instances where committees need not be established. All of the seven instances deal with buildings or premises where occupational hazards are minimal.

It is the opinion of Legal Counsel that a restrictive meaning is to be given to the words 'place of entertainment' and that the words should be taken as referable to a place of a type or having the characteristics of a theatre.

Section 8 (5) of the Act - Selection of Committee Members by a Union

Where there is a union, must the union take over the administrative process of selecting the worker representatives to a Joint Health and Safety Committee? Alternatively, if the union agrees, can management look after the administrative process which permits the workers to directly select their representatives?

Section 8 (5) provides that the worker representatives are "to be selected by the workers they are to represent, or where there is a trade union or trade unions representing such workers, by the trade union or trade unions".

The language is plain. It is for the trade unions to select the worker representatives - whether by the members at a meeting, by the executive or by some other means. The union(s) cannot abdicate this responsibility by agreement and arrangement with the employer.

Section 8 (5) of the Act - Selection of Worker Representatives by Trade Unions

What would be the consequences if a trade union representing workers of an employer with more than twenty workers refused to appoint representatives to a joint health and safety committee established by the employer pursuant to section 8(2)?

It is the opinion of Legal Counsel that subsection 5 of section 8 imposes a duty upon a trade union to select from the workers persons to represent the workers.

A failure to do so could lead to charges under section 37 against the trade union and those executives of the trade union who caused the union to contravene subsection 5.

Section 8 (5) of the Act - Ex-officio members of joint health and safety committees

What role can ex-officio members assume on joint health and safety committees? Does a physician in a hospital who acts as a resource person to the joint health and safety committee in the hospital to provide information and advice have any right to take part in recommendations or decision?

Section 8 subsection 5 provides that a joint health and safety committee shall consist of persons of whom at least half shall be workers who do not exercise managerial functions to be selected by the workers they are to represent or by the trade union.

If management of a hospital wants medical staff on the committee, and to share in its deliberations, the hospital should appoint from among such staff as representatives of the hospital. This would either reduce the representation from the Hospital Administration or alternatively increase the representation from workers as a consequence.

It is the opinion of Legal Counsel that the principle of equal representation is the important element in the composition of the committee.

Section 8 (9) of the Act - Right of Committee Members to Investigate an Accident

What is the scope of the authority to investigate cases where workers are killed or critically injured at work? Does it include investigative authority to inquire into issues not directly related to the critical injury or death in question?

Section 8 (9) gives to a worker representative on a health and safety committee the right to 'inspect the place where the accident occurred and any machine, device or thing and report his findings to a Director and to the committee'.

Under the provision, the right conferred is in no way analogous to the kind of inquiry an inspector is entitled to make under section 28. By its language, the right is limited to a physical inspection, i.e. examination, of the place and of any machine, device or thing (which was the occasion of or was involved in) the death or critical injury. It does not give the power to require the production of documents, the interviewing of persons, or the testing of the machine.

It should be remembered that the right of inspection in section 8 (9) is conferred upon a worker representative, not a professional investigator or someone having special or professional knowledge. It appears that this may underlie the restricted nature of the power to investigate.

Section 14 (2) (g) of the Act - Duties and Liabilities of Employers where Workers Exposed to hazards of Rabies

1) Can an employer require any type of immunization as a "reasonable precaution".

2) Can an employer make this requirement retroactive to existing employees?

3) Can an employer make immunization a condition of employment for new employees?

4) If an employee refuses to participate in an immunization program, will a waiver of liability signed by that employee protect the employer from charges laid under the Occupational Health and Safety Act or civil legal action arising from an incident involving an infected animal?

5) If an employee refuses to participate in an immunization program, can the employer transfer the employee to a low risk area? Ultimately, can an employee be dismissed if a low risk position is unavailable?

6) Is an employer liable for legal action arising from an adverse reaction (temporary or permanent) to an immunization program?

In general terms, the circumstances are that an employer, knows that there may be a consideable degree of risk to employees who handle animals from rabies and that a pre-exposure immunization program would reduce if not avoid the risk.

Considering the matter apart from the Occupational Health and Safety Act, the common law imposes a duty upon an employer to provide a reasonably safe work place and a reasonably safe manner of working. In fulfilling this duty in regard to animals that have to be handled by employees, the employer has two options - one is to take every reasonable precaution to see to it that the animals to be handled do not have rabies, and the other is to protect employees through immunization against rabies. The first option may be an impossible one to fulfill for technical reasons, and this leaves the second as the only reasonable course.

The Occupational Health and Safety Act, section 14 (2) (g) does no more than state the duty that the common law imposes upon employers.

It might be advisable for the employer to consult with its legal advisers since the questions asked cannot be answered solely by reference to the Occupational Health and Safety Act.

These answers are not to be taken as final determinations.

Questions 1, 2, 3 and 5 can be dealt with together. Legal Counsel believes an employer can require an immunization program in order to meet both its common law and statutory duty to take reasonable precautions for the protection of an employee. Certainly the employer can make immunization a condition of employment for new employees. As to present employees, it seems that it can, subject to the terms of employment, require these to participate in the immunization program as well, because it may be that an employee who refuses to participate may choose to grieve the matter. The result would depend upon whether or not the immunization program was considered to be a reasonable requirement by the tribunal hearing the grievance. This would require weighing the probabilities of contacting rabies and other diseases from the animals being handled.

It would appear that a tribunal would be most reluctant to find against an employer who insisted upon a reasonable immunization program.

In answer to Question 4, a waiver of liability may avoid civil action for damages by an employee but such a waiver could not protect the employer from a charge for a breach of the Occupational Health and Safety Act, nor from a compensation award under the Workers' Compensation Act.

In answer to Question 6, this would depend in part on the facts such as, that the vaccines were suitable and not contaminated; and whether they were administered properly, and so on.

Section 14 (2) (g) of the Act - Discipline of Employee under Influence of Alcohol or Drugs

What responsibilities/duties do employers have with respect to workers under the influence of alcohol or drugs?

If a worker is impaired by reason of the use of drugs or alcohol, the employer has available to him discipline, suspension or dismissal.

Under section 14 (2) (g) an employer has a duty to take every precaution reasonable in the circumstances for the protection of a worker. If a worker is impaired, the employer is entitled to take the precautions required to prevent the impaired worker from injury, or to prevent the impaired worker from possibly injuring fellow workers.

An employer has the right to insist that a worker not misconduct himself to the danger of himself or his fellow workers and a duty to remove such a source of danger from the workplace.

Section (16) Duties of Supervisor

Section 1 (29) Definition of Worker (volunteer firemen)

What is the liability of volunteer firemen, supervisors such as fire chiefs and other officials under the Occupational Health and Safety Act?

Duties imposed upon a supervisor under the Act are set out in Section 16. It would be under this section that a supervisor could be charged for any contraventions of the Act and the regulations.

Section 16 (2) sets out the duties imposed upon a supervisor such as advising the workers of dangers and taking precautions reasonable in the circumstances for the protection of a worker.

This leads to a consideration of whether a volunteer firefighter is a worker under the definition of worker in Section 1 (29) as a person who performs work or supplies services for monetary compensation.

It is understood that volunteer firefighters have different methods of receiving honorariums or payment, one being a point system where at the end of the year the points determine the amount to be paid. There are also other methods in use such as a lump sum per fire.

The circumstances as to the method of compensation and the circumstances in connection with any injuries sustained in fighting a fire would have to be examined to see if a prosecution was warranted.

Section 18 of the Act - Responsibilities of Owners Contracting Construction

What requirements are imposed upon owners who have hired contractors where the contractor does not meet the minimum requirements of the Occupational Health and Safety Act?

The Act imposes absolute liability upon the following categories of persons to comply with the Act and the regulations: the constructor, the employer, the supervisor and the worker. This absolute liability is modified as provided in subsection 37 (2) by the defence of reasonable precaution where the offence comes within the subsections and clauses enumerated.

The owner who undertakes a construction project may do so in two ways- it may act as its own general contractor and contract out various parts of the project to several contractors and it may also carry out a part of a project by its own workers, or it may engage a general contractor to do all of the project and the general contractor would then contract out the parts of the project to subcontractors.

In the former case, the owner comes within the definition of constructor in section 1(4) of the Act and is subject to the responsibilities imposed upon a constructor; in the latter case, the owner does not.

As it will be seen from an examination of sections 13 through 18, the Act places responsibilities,

(a) upon the constructor in section 13;

(b) upon the contractor (employer) in sections 14 and 15;

(c) upon a supervisor in section 16;

(d) upon a worker in section 17; and

(e) upon an owner who is not carrying out a project in section 18.

It must be pointed out for clarification that section 18 is concerned with the case of the owner of a building or a factory, and not with the owner of a workplace who intends to carry out a project.

The owner as a constructor is responsible under section 13 for ensuring that the Act and the regulations are complied with, and that contractors and their workers also comply and that health and safety of workers on the project is protected.

The responsibility imposed upon an owner as the constructor cannot be contracted out to a contractor who is carrying out a part of the project.

Where contractors do not comply with the Act and regulations, the owner as constructor has the duty to ensure that these are carried out and failure to do so leaves the owner-constructor liable to prosecution under section 13 and subject to the penalties imposed by section 37.

Section 19 of the Act(and Section 80 of the Regulations for Construction Projects) - Suppliers' Responsibility

Whose responsibility is it to ensure that the erection of a scaffolding complies with the Act and Regulation 80 of the Regulations for Construction Projects - the constructor named on the Notice of Project or the supplier of the service?

Where a company has contracted with a supplier, to supply all labour, equipment and materials for the erection and subsequent dismantling of a rental scaffold, section 80 of the applicable Regulations, read in conjunction with section 19 (b) of the Occupational Health and Safety Act, means that it is the supplier who must comply with the Act. The company as constructor, should contact the supplier, and inform the supplier of a deficiency in the scaffold. The company although it is not responsible for the building of the scaffold, does have responsibility pursuant to section 13 (1) (c), and to company employees if they are using the scaffold, under section 14 (2) (c) of the Act, to inform and protect such employees.

It ought to be noted that parties to a contract cannot contract out of their respective statutory responsibilities. With respect to contracts with suppliers, the terms of section 19 of the Act clearly set out how far one may go in stipulating responsibilities.

Section 26 of the Act - Notice of Accident

Are injuries to correctional officers which can be attributed to the deliberate and intentional actions of an inmate considered accidents under section 26 of the Act?

It is the opinion of Legal Counsel that the term "accident" used in section 26(1), and in section 27, is used in the popular and ordinary sense of the word as meaning an occurrence or event, and not in the technical sense or meaning as used in insurance policies.

In the popular or ordinary sense accident is used to describe any event or occurrence but does not include an event or occurrence which is intentionally caused by a worker himself, or someone with his consent. Thus, suicide for example or surgery would be excluded.

Some enlightenment is shed by looking at the definition of accident in the Workers' Compensation Act.

It is the opinion of Legal Counsel that lost time injury caused to a correctional officer by an inmate's assault is an accident under section 26.

Section 26 (1) - Medical Attention(Meaning)

What is the difference between "medical attention", as mentioned in Section 26 of the Act and "First Aid"? Does "medical attention" require input from a physician, nurse or a first aid trained individual?

The phrase "medical attention" under section 26 (1) does not include first aid treatment but the treatment of an injury by a medical practioner.

Thus, first aid which involves the administration of treatment by a person trained in first aid or by a nurse would not be included with the meaning of the term in section 26 (1).

Section 28 (1) and (3) and 33(1) and (2) of the Act - Searches or Other Restrictions on Inspector's Right of Entry

Can a company insist that Ministry inspectors submit to searches prior to being allowed to inspect certain areas in the company's premises or that the inspector sign visitor registers prior to being granted entry?

Companies cannot lawfully require Ministry inspectors to submit to these restraints on their right of entry. Inspectors should not acquiesce to these demands. An inspector's right to entry into a workplace which is not a dwelling house is established by section 28 (1) which provides that an inspector may:

> " enter in or upon any work place at any time without warrant or notice."

The other powers conferred by section 28 (1) make it clear that the inspector is free to move freely around a workplace once he has entered it for the purpose of conducting his inspection. This is also made clear by section 28(3) which requires an employer whose premises are being inspected to afford an employee representative "the opportunity to accompany the inspector during his physical inspection of a workplace, or part or parts thereof".

Section 33(1) then enacts a prohibition against obstructing an inspector by stating:

> "No person shall hinder, obstruct,molest or interfere with or attempt to hinder, obstruct, molest or interfere with an inspector in the exercise of a power or performance of a duty under this Act or the Regulations."

Section 33 (2) then creates a positive duty to assist an inspector in his inspection by stating:

> "Every person shall furnish all necessary means in his power to facilitate any entry, inspection, examination, testing or enquiry by an inspector in the exercise of his powers or performance of his duties under this Act or the Regulations."

It is Counsel's view that any company or security guard which insisted that an inspector submit to a search or a requirement that he sign a register before granting him entry would be both obstructing and hindering him. Further, these actions would also constitute a failure to facilitate his entry or inspection.

A breach of either subsection 1 or 2 of section 33 would be sufficient to launch a prosecution under section 37 (1) of the Act.

In light of these provisions, it is recommended that the following steps be followed if any inspectors are advised that they will be denied entry unless they submit to a search, sign an attendance register or fulfill some other condition prior to being allowed to enter a particular workplace. They should advise the party who seeks to have them comply with such a condition that they have an unrestricted right of entry and refer him to the appropriate provisions in the Act. They should show him their official identification. They should indicate that they will refuse to submit to these conditions and that, if there is any attempt to enforce them, consideration will be given to charges under the Occupational Health and Safety Act. Further, they should indicate that if there is any physical interference with their persons it will be regarded as a criminal assault which may also result in a prosecution under the Criminal Code. They should then proceed to attempt to conduct their inspection. If they are met with any resistance, they should simply desist and request that the Legal Branch lay charges forthwith.

This opinion is subject to the following caveats. There may be occasions where a particular party whose premises are being inspected may have a statutory basis for requiring an inspector to sign an attendance register or comply with some other condition. An example would be where an inspector sought to conduct a construction safety inspection on a federal military base. The National Defence Regulations provide that visitors to a military base must secure a pass and Counsel has previously advised that this federal legislation would override the provisions of the Occupational Health and Safety Act. Similar restrictions may exist under other federal legislation. Thus, if an inspector believes that a particular employer, who is insisting on the acceptance of certain conditions prior to granting him entry, may be acting pursuant to some statutory authority, he should enquire if there is any statutory basis for the request. If the answer is positive, he should then seek advice from the Legal Branch. The only other caveat which might be added is one which inspectors observe already; namely, the use of common sense. There may be certain conditions which serve a valid occupational health or safety purpose which would be complied with voluntarily. For example, an inspector might properly be asked not to carry matches or a lighter in an area where high explosives were kept.

Section 28 (3) of the Act - Right of Worker Accompaniment and Payment of Transportation Costs to Remote or Branch Locations

Who is obliged to transport and pay for transportation of the worker, acting as a worker representative on a joint health and safety committee or a health and safety representative, who accompanies an inspector of the Ministry pursuant to section 28 (3) of the Act, when the site of inspection is not located where the worker is ordinarily based?

The Act does not speak expilicitly to the matter of who should pay for such a person's transportation. However, the Act is not silent with respect to the obligations of the employer. The sum effect of the following provisions, coupled with the general intent of the Act, is to create the obligation on the part of employer, to transport the worker member as a committee or a health and safety representative to the site of an inspection, or, in the alternative, to pay the costs of such transportation:

Section 28 (3):

> Where an inspector makes an inspection of a workplace under the powers conferred upon him under subsection 1, the constructor, employer or group of employers shall afford a committee member representing workers or a health and safety representative, if any, or a worker selected by a trade union or trade unions, if any because of his knowledge, experience and training, to represent it or them and, where there is no trade union, a worker selected by the workers because of his knowledge, training and experience to represent them, the opportunity to accompany the inspector during his physical inspection of a workplace, or any part or parts thereof. (emphasis added)

Section 28 (5):

> The time spent by a committee member representing workers, health and safety representative or worker selected in accordance with subsection 3 in accompanying an inspector during his physical inspection, shall be deemed to be work time for which he shall be paid by his employer at his regular or premium rate as may be proper. (emphasis added)

Section 14 (2) (d):

> 1. Without limiting the strict duty imposed by subsection 1, an employer shall (...)
>
> > (d) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions: (emphasis added)

Furthermore, the Act provides in sections 8(8) and 7(6) that a worker member of the committee or a health and safety representative has a right to carry out workplace inspections, and in both sections, reference is made to the duty of employers (and workers) to afford such person such information and assistance as may be required for the purpose of carrying out the inspection. In connection with such inspections, transportation to and access to the site in question should be considered to fall within the bounds of affording "assistance" to that person.

Section 34 (1) (b) of the Act - Secret Manufacturing Process or Trade Secret

What is a trade secret or secret manufacturing process?

'Secret' is not defined in the Act or in a regulation. The Shorter Oxford Dictionary defines 'secret' as a thing kept from public knowledge, done with the intention of being concealed, something that is known only by being revealed, a method or process hidden from all except the initiated.

In order that a manufacturing process or business information be considered to be secret, there must be some conscious or intentional concealment of the process or information from public knowledge. The determination of whether information about a process or business is secret will usually be answered by ascertaining whether the proprietor sought to keep it from public knowledge and to impress employees and others to whom it was revealed with an obligation not to disclose it.

If the process or business information is not so regarded and is a matter of public knowledge or could be so, it is not a secret. It is not a secret if the public by making inquiries or inspecting or testing the product could discover the process or manner of manufacture or the components and the way and proportion in which they are combined or blended or the business information.

Section 100 - Regulations for Construction Projects - Qualifications of Electrical Workers

Does the term "similarly qualified by training and experience" as in section 100 of the Construction Regulations mean that there are other trades qualified to connect and disconnect electrical equipment or tools from a power source?

Section 100 of the Regulation for Construction Projects states in part that a person who is similarly qualified by training and experience to a worker who is an electrician certified under A.T.Q.A. shall connect electrical equipment.

The language is taken from section 71 (2) of the Construction Safety Act Regulation.

Much of this work is done by apprentices in the trade or by workers who have training and experience that is equal to that possessed by a certified electrician.

The intention was not to restrict the work to be performed only by a worker with a certificate.

Section 119 (2) (d) (iii) (b) of the Regulations for Construction Projects - Confined Space Entry

What does section 119 (2) (d) (iii) (b) of the Regulations for Construction Projects mean?

The section in question, which has now been in force on construction projects for almost three years, and in industrial establishments for over ten years (see Regulation made under The Industrial Health and Safety Act, 1971, section 84; Regulations for Industrial Establishments under the Occupational Health and Safety Act, section 72), has not, to our knowledge, been the subject of difficulty. It ought to be noted that the "hazard" referred to refers to the hazards listed in subsection 119 (2) (d) - "oxygen deficiency, flammability, explosive conditions and toxic vapours".

The thinking behind the regulation is that the "competent person" referred to (see section 1(2) of the Act), who may or may not be a supervisor, should be there not only to record the test results and evaluate them, but also to certify them, a further and necessary step to ensure that the workers possibly exposed to a hazard will not be endangered. The referenced paragraph in section 119 does not state that such a peson must guarantee the safety of workers - the test to be applied is "what would a reasonable man do?" The paragraph calls for an evaluation of monitoring data, not a simple reliance on the monitoring devices being used; this approach to the regulation is consistent with the various responsibilities of parties set out in Part III of the Act (sections 13-19).

Application of Regulations for Industrial Estabishments to Fire Trucks(also section 14 of the Act)

Do the regulations for Industrial Establishments apply to fire trucks?

There is a general duty upon an employer as provided by section 14 (2) (g) of the Act. There are no specific regulations applying to Municipal Corporations and equipment such as trucks, however, in Legal Counsel's view the requlation could be taken as a guide or indication of what might be reasonable precautions.

There are, of course, other provisions affecting the responsibility of employers, for example, section 14 (1) (b), (e), as well as the provisions of subsection 2 of section 14.

Medical Examinations - Requirements Under the Act and the Regulations for Industrial Establishments

Does the Act or the regulations for Industrial Establishments require or permit an employer to require workers operating equipment such as a crane or other machine to submit to medical examinations?

The only mention of a worker being required to undergo a medical examination in the Act is in section 17 (1) (e). This clause only requires such medical examinations where a regulation prescribes them. There is no section in the Industrial Estabishments Regulation which prescribes medical examinations for workers.

Accordingly, the answer to the question is in the negative.

Application of Ontario Regulation 125/83 (Regulating Head Protection for Firefighters) and Section 14 (2) (g) of the Act

Does the regulation apply to in-plant firefighting forces?

The regulation applies to full-time or volunteer fire fighters in a fire department organized under the Municipal Act.

If fire fighting forces are not a fire department organized under the Municipal Act the regulation does not apply to such forces.

It should be noted to avoid misunderstandings, that an employer has, under section 14 (2) (g) of the Act a duty to take every precaution reasonable in the circumstances for the protection of a worker.

Where a worker is assigned as a fire fighter, the general duty upon an employer to take every reasonable precaution requires the employer to concern itself with protective equipment being used that is suitable and adequate as protection. In developing the Ontario Code for the head protection of fire fighters tests were conducted on various types of helmets in use by fire fighters in Canada and the U.S.A. It was apparent from such tests that plastic helmets deteriorated from heat and became useless as head protection from falling debris.

Section 3 of the Regulations Respecting Lead — Application to Construction and Construction Projects

What are the obligations of an employer under the lead regulation, where the employer (1) has construction carried out through his own employees;(2) has the construction carried out through a contractor by the contractor's employees; (3) is the constructor of a project and has contractors with their employees; (4) is the constructor of a project and uses his own employees as well as the contractors with their employees?

(1) Where construction is carried out by the employer through his own workers, the whole of the lead regulation applies by virtue of subsection 1 of section 3.

(2) Where construction is carried out by a contractor, the employer is responsible for seeing that the contractor's employees are protected under sections 4 and 5 of the Regulation, from lead exposure.

(3) Where the employer is a constructor of a project, the lead regulation does not apply to the project workers employed by a contractor.

(4) Where the employer is a constructor of a project, the lead regulation does not apply to workers on the project employed by the employer.

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Section 8 (9) of the Act - Powers of Designated Worker Representatives of a Joint Health and Safety Committee

What is the extent of the investigation powers conferred upon a designated member of the joint health and safety committee under section 8(9), particularly to conduct interviews of witnesses?

Subsection 8(9) empowers a designee of the worker representatives on a joint health and safety committee to investigate cases where a worker is killed or critically injured at a work place from any cause and inspect the place, and any machine, device or thing (which caused or contributed to the death or injury) and report thereon.

An investigation would include a search or examination of the physical evidence, including the making of inquiries as to how and why the death or injury occurred. In carrying out the investigation the power of inspecting the locus and the machine, device or thing which was a causal factor in the death or injury is conferred expressly. It is apparent that this power was believed necessary to be expressly set out in order that an employer could not abort the investigation by denying a designee access to the scene or the machine.

The power of investigation given by subsection 8(9) is enhanced and protected by the provisions of clauses 34(5)(a) and (b). These clauses make it an offence for a person knowingly to hinder or interfere with a committee member exercising a power under the Act, or to furnish false information to a committee member exercising a power under the Act.

When one examines the powers of an inspector under the Act, one finds an express provision, clause 28(1)(g), expressly empowering an inspector to make inquiries of any person in a work place separate and apart from a person or in the presence of a person. This power is buttressed by the provisions of section 33 which prohibit a person from hindering an inspector in the exercise of a power, requiring a person to furnish all means to facilitate an inquiry by an inspector, prohibiting the knowingly furnishing of false information to an inspector and requiring information to be furnished.

The above review lead to the conclusion that a designee under subsection 8(9), while entitled to pursue inquiries is not in a similar position to an inspector who is entitled to be assisted in his inquiries, and to require information to be furnished to him. There is no provision in the Act which requires a person to disclose or communicate information to a worker designee. There being no compulsion to answer inquiries, it can be concluded that denying a worker designee an opportunity to ask questions is not a hinderance, as a general proposition, unless it can be shown that the person was willing to and wanted to answer questions but was prevented from doing so.

The rationale as to the difference between an inspector and a worker designee is to be found in the fact that an inspector receiving information under the compulsion of the Act is required to maintain confidentiality except where otherwise required by the Act or the law and any breach of this duty is enforceable by diciplinary action. No such duty is imposed upon a designee.

Section 17(1)(c) of the Act - Worker's Duty to Report Absence or Defect and Section 23(3) of the Act - Refusal To Work

When is a worker to be taken as having exercised his or her right under subsection 23(3) to refuse to work?

This issue is of importance because if the worker is exercising a right of refusal under subsection 23(3), it becomes obligatory upon the worker and the employer to follow the steps set out in subsection 23(4), and these steps may be followed by the exercise of a further refusal under section 23(6) and the steps mandated by subsections 23(7), (8), (9), (10) and (11).

If a worker is not exercising a right to refuse work under subsection 23(3), and instead is acting under clause 17(1)(c) or (d), the obligatory steps required to be followed by the worker and the employer in subsection 23(4) do not apply.

The purpose and intention of the Act is not to add to the burdens and obligations of the employer and the worker, but to provide safeguards for the protection of workers. In the absence of any retaliatory or disciplinary proceeding taken against a worker which presents quite a different case, the worker is entitled to and indeed required to report defects in equipment of which he is aware and contraventions of the Act and regulations if they are know to him. By reporting such defects or

contraventions, an immediate opportunity is given to a supervisor or employer to rectify them at once. If the worker believes that the rectification is unsatisfactory, he is not precluded from exercising his right to refuse to work. A difficulty may arise here whether a worker is or is not satisfied with the rectification but is unwilling to insist on further action being taken. In these circumstances a good deal of responsibility is placed upon a supervisor to take the necessary steps to correct the defect or the contravention and not simply take token action which may create a trap for the particular worker or another worker on the assumption the defect or contravention is cured once and for all. It is presumed this is the basis for the suggestion that such a report by a worker be treated as the exercise of the right to refuse under subsection 23(3).

A worker is entitled to treat his objections as a report under the provisions of subsection 17(1), or as the exercise of his right under section 23(3) or as both.

In conclusion, the particular circumstances will determine how the issue is to be handled. If a worker wants a new tool because of some defect in the one supplied and is given a new tool or one that is free of defect, it does not follow that he is purporting to exercise the right under section 23(3) so that a full scale investigation is required under subsection 23(4).

If the worker complains of a defective machine and the complaint involves a substantial issue as to its correction it may be a matter that cannot be solved immediately and satisfactorily at the shop level. In such a case, investigation appears to be the solution.

Section 34 of the Act - Information to be Given to the Joint Health and Safety Committee Respecting Hazards in Substances and the Requirement that an Oath of Secrecy be Signed Concerning Data Given

To what extent is disclosure required to be made to the joint health and safety committee respecting hazardous substances?

As to the extent to which disclosure is required to be made, the information should be sufficient to enable a person knowledgeable about the dangers to be able to form

an independent judgment as to the hazards. If this requirement means that quantities or percentages of the ingredients be furnished, then that is the information to be given. If approximations are sufficient to enable a judgement to be made, then they are sufficient, e.g., 10% - 15% substance a, 50% to 60% substance b, etc.

Does the Act require that an oath of secrecy be signed respecting any data given the joint health and safety committee?

There is no provision in the Act which would require a worker to sign an oath of secrecy. If this is being required by the employer it would not be because of the Act but as a term or condition of employment and thus be a matter of employer and employee relations. The Act by section 34(1)(b) prohibits the disclosure of a secret manufacturing process or trade secret by any person.

Section 73 (h) of the Regulations for Industrial Establishments

What does this clause mean?

Section 73 of the Regulations for Industrial Establishments prescribes the measures and procedures to be taken when a confined space in which a hazardous gas, vapour, dust or fume is present or a lack of oxygen may be encountered is to be entered by a worker.

Before such a space is entered by a worker, the measures outlined in section 72 must be taken, and the further measures set out in section 73 are to be observed. It should be noted, in this connection that the last measure under the arrangement of section 73 is clause (h) requiring a person adequately trained in artificial respiration to be "conveniently available".

Notice should be taken that the same clause appears in the Regulations for Mines and Mining Plant s. 262(h), and the Regulations for Construction Projects s. 119(3)(e).

The main objective of the regulations is that the language should not require an employer to station another worker trained in artifical respiration outside of every confined space a worker was to enter. It should be noted that the section by clause

(f) requires a worker to be stationed outside the confined space when a worker enters a confined space. Such a worker is there to rescue the worker entering if rescue is needed. The language of clause (f) is different from that in clause (h) and it is Counsel's view that clause (h) does not require the worker trained in artificial respiration to be stationed outside the confined space.

While it is not possible to give a direct answer as to what is "conveniently available", that is, in space or time, it is possible to say more than five minutes, or a distance which would take the trained worker more than five minutes to arrive at the confined space makes the trained worker inconveniently available.

While the question cannot be dogmatically answered, a trained worker who can arrive at the scene in about two minutes is conveniently available, but is not conveniently available if it takes him five minutes.

Regulation respecting Isocyanates - made under the Occupational Health and Safety Act - Subsection 4(1) "Lowest practical Level"

What is the interpretation and application of the "lowest practical level" in subsection 4(1) of the isocyanates regulation?

A number of the designated substance regulations that have been promulgated by the Ministry of Labour require employers to reduce exposure to particular substances to the "lowest practical level". The purpose of this note is to provide guidance to employers and to members of joint health and safety committees on how one identifies the lowest practical exposure level that should be achieved in a given workplace.

In order to address this issue, it will be necessary to review the provisions contained in these regulations that relate to the maintenance of exposure levels. The isocyanates regulation (hereinafter referred to as the regulation) will be employed as the example.

The key provision of the regulation is subsection 4(1) which states that:

> "Every employer shall take all necessary measures and procedures by means of engineering controls, work practices and hygiene practices and facilities to ensure that the time-weighted average exposure of a worker to isocyanates is reduced to the lowest practical level and in any case shall not exceed 0.005 parts isocyanates per million parts air....."

Subsection 4(3) elaborates on the methods that may be employed to achieve the exposure levels. This provision specifies that "subject to subsection (7) every employer shall comply with (subsection 1) ...without requiring a worker to wear or use respiratory equipment". Subsection 7, in turn, provides that:

> "Where the strict duty imposed by subsection 1 ... cannot be complied with because,
>
> a) an emergency exists; or
>
> b) the measures and procedures necessary to control the exposure of a worker to the airborne isocyanates,
>
> i) do not exist or are not available.
>
> ii) are not reasonable or practical for the length of time or frequency of exposure or the nature of the process, operation or work, or
>
> iii) are not effective because of a temporary breakdown of equipment,
>
> the employer shall provide a worker with respiratory equipment which shall be used by the worker."

Where subsection 4(1) must be complied with, it will fall to the employer, in consultation with the joint health and safety committee, to determine the lowest practical exposure level that can be achieved in a particular location. This is of course subject to audit by the Ministry inspectorate. What does the term "lowest

practical level" actually mean? In the Ministry's view, this term, when read in the context of subsection 4(1), means that an employer would be required to adopt those engineering controls, work practices and hygiene practices that a responsible and prudent employer would put into effect taking into consideration the plant, equipment, engineering controls and work practices in the workplace, and what can be done by way of improvement, modification and replacement, where this is realistic and reasonable for the particular workplace.

The question of whether an employer has, through the use of engineering controls and related measures, reduced exposures to the lowest practical level, is difficult to answer in the abstract. What levels are reasonably capable of being achieved will invariably depend on the characteristics of individual work sites, no two of which are exactly alike. In this respect, the measures and procedures adopted in one location may not be practical for another. Therefore, the lowest practical level must be determined for a specific workplace at a given point in time.

There are, however, a number of factors that should be considered in determining whether the lowest practical level has been obtained. Some of these factors are:

1) The extent of the health benefits that will likely be obtained from improvements or modifications to existing engineering controls, etc. in the workplace.

2) The exposure levels that were achieved in the work site in the past.

3) The exposure levels being met in similar worksites.

4) The cost of introducing new engineering controls, or modifying those already in place.

5) The technological feasibility of achieving lower exposure levels.

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Sections 1.3 and 1.23 of the Act - Definition of Construction and Project

Question: Is the installation of a satellite dish on a private dwelling a construction project?

Answer: The installation of a satellite dish on a private dwelling, when it is not permanently attached to the dwelling, is not within the definition of construction (i.e., "installation of any machinery or plant") nor does it fall within the definition of a project (as it is not a telegraph, telephone or electrical cable) as found in s.1.3 and s.1.23 respectively of the Occupational Health and Safety Act.

Sections 1.13, 1.10(iii), and 1.15 of the Act and Subsection 107(h) of the Regulations for Industrial Establishments — Application of Act to One Person Logging Operations.

Situation: Over the past few years there has been a change from logging companies running their own logging operations to contracting out the logging operations. Logging company contractors may subcontract to single operators who own a skidder or chain saw or both. Such workers are paid on a piecework basis. The contractor does not supply a supervisor for these workers who work alone or in two-person crews or with partners.

Question: Do the Act and Regulations for Industrial Establishments apply to self-employed one person logging operations?

Answer: Section 1.13 of the Act defines an industrial establishment as a factory. Factory is defined by section 1.10 (iii) as including a logging operation and logging is defined in section 1.15. Therefore, the Act and Regulations for Industrial Establishments apply to a logging operation.

Section 107(h) of the Regulation for Industrial Establishments defines logger to mean a worker, employer and any person under the control of the employer. Thus the Act and Regulations for Industrial Establishments apply to self-employed one person logging operations.

Section 21 of the Act — Trade Secrets

Question: Is the reference to common or generic names in section 21(1) of the Act large enough to encompass both trade names and chemical names?

Answer:

In this case the legislation clearly is designed to protect workers from hazards in the workplace and the specific purpose of section 21(1) is to require certain specified parties to provide sufficient information about new agents in order that the use of the agent can be restricted or controlled, where necessary, in order that workers will not be exposed to potentially dangerous chemicals.

It is understood that the objective of section 21 could not be attained unless the expression "common or generic name or names" is read to include both trade names as well as chemical names. It is therefore the opinion of legal counsel that the Ministry of Labour is entitled to obtain this information from anyone to whom section 21 applies.

Sections 21(2) and 28 of the Act — Authority to Request from Manufacturer, Distributor or Supplier a List of Users or Customers to Whom New Agents or Combination of News Agents are Sold in Ontario

Question: Does section 21(2) of the Act read in conjunction with section 28(1)(L) confer authority to request of a manufacturer, distributor or supplier a list of the users or customers to whom new agents or combinations of new agents are sold in Ontario?

Answer: Section 21 imposes a statutory obligation upon manufacturers, distributors and suppliers of new agents or combinations of new agents in Ontario to give notice of the ingredients and physical and chemical properties of such agents, the manner of use, the toxic effects, effects of exposure, measures to be used for protection, emergency treatment for exposures

thereto, and the effects of the use, transport and disposal of such agents.

Neither Section 21 nor the Clauses in Section 28(1)(L) give or confer the right to demand lists of users or customers for new agents from a manufacturer, distributor or supplier. Such a power must be found elsewhere in the Act.

It is legal counsel's opinion that such a power is to be found in Clauses (c), (d) and (g) of Subsection (1) of Section 28. These clauses confer upon an inspector power to require the production of any document or record that an inspector requires for the purpose of carrying out his duties and powers under the Act (Clause (c)), make copies (Clause (d)), and make inquiries of any person in the work place (Clause (g)).

The power thereby conferred is to be exercised in connection with carrying out any duty or power under the Act. One of such duties or powers is to see to it that employers observe the responsibilities imposed upon them by Section 14(2)(a), (c) and (g), which clauses require an employer to provide information to protect the health or safety of the worker (employees of purchasers or customers), or to acquaint workers or their supervisors with hazards in the use, etc., of agents, or to take precautions necessary to protect workers.

A company, under the Clauses of Section 14(2), has a duty to a worker who comes into contact with its products to disclose their toxicity, and what precautions are necessary for a worker to take. An inspector is entitled to request information to see if such duty has been complied with.

Section 23 of the Act — Assignment of Alternate Work Before Inspector Called to Investigate

Question: Where a worker has refused to perform work under Section 23 of the Act, can that worker be assigned alternate work before first calling in an inspector to investigate the work refusal?

Answer: Subsection 23(5) of the Act provides for a worker to remain in a safe place near his work station until the investigation by the employer or supervisor

takes place. This investigation is to be done in the presence of either a committee member representing workers, a health and safety representative or a worker selected by a trade union or workers, because of the worker's knowledge, experience and training. This investigation is to be conducted forthwith (emphasis added) after the refusal is reported.

Where the worker continues to refuse work following this investigation, an inspector of the Ministry of Labour is to be contacted to investigate the refusal to work. Subsection 23(10) provides, pending the investigation and decision of the inspector, that the worker is to remain in a safe place near his working station unless (emphasis added) the employer assigns the worker reasonable alternative work during such hours, or where an assignment of reasonable alternate work is not practicable, the employer gives other directions to the worker, subject to the prohibition against reprisals contained in section 24. Assignment of alternate work by the employer is also subject to the provisions of the Collective Agreement where such an agreement is in force.

Thus, where a Ministry inspector has not yet been contacted to investigate a refusal to work, the worker must remain in a safe place near his work station until the investigation takes place. If however, after the investigation, major changes are required which take hours or days to make the particular work site, equipment, etc. safe, it seems reasonable for the worker to be assigned alternate duties until the changes are completed and the worker can return to the job where the refusal took place.

Subsection 23(2)1 of the Act and Subsection 3.3 of the Regulation 191/84 (Teachers) — Refusal to Work by Teacher in Psychiatric Facility.

Situation: A psychiatric facility includes a K to 13 school that is accessible only to children at the Centre for treatment as either "live-ins" or day patients.

Question: Could a teacher refuse to work in this facility?

Answer: A teacher would have the right to refuse unsafe work except where the life, health or safety of a pupil may be in imminent jeopardy.

Subsection 25(1) of the Act — Sending Written Reports to a Director within 48 hours after a person is killed or critically injured

Situation: Service and Maintenance crews on a construction project operate within several hundreds of kilometres from the office of an employer. The safety personnel of the employer are required to inspect the accident site within 48 hours of its occurrence. It is often not possible to prepare a report and mail it to the Director within 48 hours.

Notification of a Ministry inspector by telephone sometimes presents a problem but the employer attempts to comply with this requirement.

Question 1: Can an Occupational Health and Safety Division Director exempt an employer from the requirement of sending a report within 48 hours?

Answer: Directors of the Occupational Health and Safety Division do not have authority to extend the period set out in Subsection 25(1) of the Act. When an employer acts as either a constructor or employer on a construction project the employer ought to have a person in authority on the site from the commencement of construction who could satisfy the requirements of subsection 25(1).

Question 2: Who is the Director referred to in Subsection 25(1)? Must the report be sent to a local Ministry of Labour office or to Toronto Head Office?

Answer: This is a policy matter for the Division. Reports sent to the Division addressed to the Branch Director and sent to either the local office or head office in Toronto would satisfy the intent of the requirement.

Subsection 25(1) of the Act — Accidents involving government workers in motor vehicles

Question: Are accidents involving government workers in vehicles to be reported as per subsection 25(1)? Will Ministry of Labour inspectors investigate?

Answer: The Ministry of Labour has jurisdiction in all workplaces with the exception of farming operations and those that are not exclusively federal government workplaces. This includes a traffic accident in which an employee is involved on a highway, where the accident is governed by the Highway Traffic Act. A report to the Ministry is therefore required.

Since the police normally investigate these accidents, Ministry inspectors do not generally investigate.

Subsection 4(1)(a) of the Regulations for Construction Projects — Notice of Project for Single Family Dwelling Built by Owner and Family

Situation: A house is being built on land owned by a private citizen, under the supervision of his father. The house is being built on a voluntary basis (without wages) and with the assistance of friends from time to time. The friends are not paid, but may return the favour in kind through an informal barter system. It is not known at this time whether the cost of labour and materials for the house will exceed $50,000.00.

Question: Is a Notice of Project required in this situation?

Answer: A Notice of project is required if the labour and materials will exceed $50,000.00 in cost.

Although the persons currently doing work on the property would probably not be "workers" within the statutory definition, this does not affect the owner's responsibility to file a Notice of Project pursuant to section 4 of the Regulations for Construction Projects if the cost of the construction is likely to be over $50,000.00. Neither the definition of "project" or "constructor" depend upon the existence of "workers" as defined in the Act.

While the constructor in this case may be under no obligation to notify under section 4(1) (a) of the Regulations if the cost of the project is under $50,000.00, there is no exemption available under section 3 of the Act. Section 3 specifically exempts work done by the owner or his servant "to, in or about a private residence or the land and appurtenances used in connection

therewith." This section of the Act is intended to apply to situations such as an owner renovating his own house without hiring extra help, or an owner constructing an "appurtenance" to his residence such as a tool shed. Section 3 would therefore not exempt the situation described here, i.e. a new house being constructed near the owner's current residence.

Jurisdiction on Landfill Sites

Situation: An accident occurred to a worker dumping fill from construction projects at a landfill site.

Question: Is the site a construction project or an industrial establishment?

Answer: The definition of a project is found in Section 1(23) of the Act which includes "any work or undertaking, on any lands or appurtenances used in connection with construction." In this particular situation the landfill site fell within the definition of a project because the landfill being dumped emanated from a construction site. As the source of the landfill clearly fell within the definition of "project", the destination of the landfill also fell within the definition of project because of the extended definition found in section 1(23)(iv) of the Act. If the dumping of landfill had not been an extension of a construction undertaking but rather pursuant to an industrial enterprise engaged solely in dumping, a different opinion would have been given in this case.

Section 3(1) of the Lead Regulation - Application to a Workplace Where Substance Present But not in Amounts That Workers Likely to Inhale, Ingest or Absorb

Situation: A company asserts that a designated substance regulation does not apply in the workplace and thus an assessment is not required. Although the substances is present, the employer representative submits that it is not present in such amounts that a worker is likely to inhale, ingest or absorb it.

Question: Does a designated substance regulation apply to a workplace where the substance is present but not in such amounts that a worker is likely to inhale, ingest or absorb it?

Answer: The Ministry inspector must make his own determination as to whether or not exposure is likely. Even though a designated substance may be present, the regulation will not apply if a worker is not "likely to inhale, ingest or absorb" it. The use of the adjective "likely" implies a degree of probability as opposed to a mere possibility.

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Sections 1.26 of the the Act - Definition of Supervisor

Question: Is a leadhand position "supervisory" within the definition in the Occupational Health and Safety Act?

Answer: Where a job description provides that while one of the job duties of the leadhand is to instruct and supervise crews in the use of equipment, there is a clear absence of any power to discipline employees and thus ensure compliance with instructions, the omission would seem to take the position outside of the category "supervisor" for purposes of the Occupational Health and Safety Act.

Section 1.29 of the Act - Definition of a Worker

Question: Is a person who is receiving WCB payments a worker according to the definition in the Act?

Answer: This person is not a worker under the Act since no work is being performed and consequently no compensation is being provided by an employer.

Sections 8(12) and 14(2) (d) of the Act - Attendance at Joint Health and Safety Committee Meetings

Question: If a member of a Joint Health and Safety Committee is unable to attend a regularly scheduled committee meeting because it falls on his regularly scheduled day-off, and the employer refuses to change his schedule, does the worker have the right to change his schedule in order to attend the meeting?

Answer: Subsection 8(12) provides that a member of the committee is entitled to release time from his employment to attend health and safety committee meetings and to be paid therefor at his regular or premium rate. However, this section does not compel an employer to change a worker's schedule in order to enable him to attend a meeting without inconvenience. All it does is mandate that the worker is entitled to attend and to be paid for the time he spends in attendance.

Section 14(2) (d) of the Act requires an employer to "afford assistance and cooperation to a committee and a health and safety representative" in carrying out their work. While this section would not necessarily compel an employer to change a worker's schedule in the interests of furthering his health and safety committee activities, it puts an obligation upon an employer to make a bona-fide effort to cooperate with the committee member and to provide assistance to the individual in carrying out of his committee duties. To satisfy the requirements of this section, the employer would have to demonstrate that he had made a conscientious attempt to accommodate the committee member's request for a change of schedule. If, for example, the employer is able to show that his business simply cannot operate if the worker's schedule is changed, this would be a valid reason for the employer to refuse a schedule change. An evaluation must be made of the reasons given by the employer for the refusal of the schedule change in order to know whether the section of the Act has been met.

An earlier legal opinion noted that one way to avoid disputes in this matter is to appoint alternate members in order to avoid inconvenience and cost (see section 8(12) of the April, 1982 interpretation opinions).

Section 23 of the Act - Right to Refuse Unsafe Work

Question: Can a breast-feeding mother refuse to work where toxins or other substances present in the work place, could endanger her breast-feeding child by contaminating her milk which would then be consumed by the child?

Answer: The hypothesis upon which this question is based appears to be that the toxins would pose no danger to the mother herself, but would constitute a risk to the child if transmitted by the mother's milk. Subsection 23(3), which establishes the right to refuse unsafe work, clearly states that a worker only has the right to refuse unsafe work where the worker or another worker is endangered. Therefore, if the properties of the toxin or substance were such that they would not endanger the worker herself, but would endanger her breast-feeding infant, section 23(3) of the Act would not apply.

In the case of a pregnant worker, there is no distinction in law between the mother and her fetus and, thus, a danger to the fetus is a danger to its mother. However, once the child is born, the child becomes a separate legal person, and clearly does not come within the definition of other "worker".

Section 26 of the Act and Subsection 5(4) of Ontario Regulation 692/80

Question: Does subsection 5(4) of the regulations for industrial establishments (Ontario Regulation 692/80) conflict with the notification requirements of section 26 of the Act?

Answer: Section 26 of the Act is a general requirement for notifying the Director of an injury caused by an accident, explosion, fire or occupational illness. Both subsections 26(1) and 26(2) specify that such notice contain "such information and particulars as may be prescribed". The term "prescribed" means prescribed by regulation. Ontario regulation 692/80 subsection 5(4) specifies that notice has been given to the Director when the record of the accident, explosion, fire or occupational illness is kept in accordance with section 5(3) of the regulation and is available for the inspection of an inspector. Section 5(3) details the information to be recorded by the employer.

Therefore, for accidents requiring medical attention but not disabling a worker from performing his usual work a record shall be kept in the permanent records of an employer. Such records shall be available for the inspection of an inspector and shall be deemed to constitute sufficient notice to the Director as required by the Act.

Paragraph 87(2) (i) of the Regulations for Construction Projects - Guarding

Question: Do a flashing light and warning signs provide protection equal to or greater than a physical guard against a shearing hazard?

Answer: Paragraph 87(2) (i) of the Construction Regulation provides that: "A movable working platform operated by mechanical or electrical power including an elevating rolling scaffold and a self-propelled elevating scaffold

or work platform shall, (i) be guarded, where equipped with a scissor-type or other lifting mechanism which may create a shearing hazard to workers".

A flashing light and warning signs would not "afford reasonable safety to any person". A "guard" or "to guard" in our regulations can only refer to a barrier of some sort which would provide safety. A flashing light and warning signs would only advise, notify or signal imminent danger or risk but not protect against it. Therefore, flashing lights on a device would not render the device "guarded".

Section 141 of the Regulations for Industrial Establishments - Requirement for a Place Suitable for Eating Purposes

Question: Is a separate lunch room required where there is no significant health hazard from the chemicals being used in the plant?

Answer: Section 141 specifies that "a place suitable for eating purposes shall be provided". The term "place" was used rather than the term "room" which would clearly mandate the setting aside of a separate room as a lunch area. For example, section 140 of the regulation which speaks of the provision of a first aid station, requires a "room" or other space...affording reasonable privacy". This, taken in conjunction with the ordinary meaning of the words used in this section indicates that the section is satisfied if the employer provides any place suitable for eating, even if that place is the work station (with work materials removed). Of course, pursuant to section 141 (b) the above rule would only apply where there is no exposure "to a substance that is poisonous by ingestion".

For Reference
Not to be taken from this room

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The Occupational Health and
Safety Act